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" SIR JOHN EDGE, *Kt.*

PUISNE JUDGES:

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THE

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APPELLATE CIVIL.

1885
June 12.

Before Sir W. Comer Petheram, Kt, Chief Justice, and Mr. Justice Brodhurst.

PARBATI (DEFENDANT) *v* SUNDAR (PLAINTIFF).*

Hindu Law—Brahmans—Adoption of sister's son—Suit for partition of property by person in possession making a false claim thereto.

According to the Hindu Law, a Brahman cannot validly adopt his sister's son.

B, a childless Hindu and a Brahman, adopted *X*, his sister's son, and, subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death, *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate.

Held that the adoption of *X*, by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs.

Held also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory* v. *Delamirie* (1) and *Asher* v. *Whitlock* (2) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Mr. *C. H. Hill* and Pandits *Bishambar Nath* and *Sundar Lal* for the respondent.

PETHERAM, C. J.—This is a suit instituted by one Musammat Sundar against Musammat Parbati, both of them being the widows

* First Appeal No. 37 of 1884, from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Saháranpur, dated the 27th February, 1884.

(1) Smith's L. C. 6th edn, 313. (2) L. R., 1 Q. B. 1.

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of one Baldeo Sahai, for partition of the property in suit said to be held jointly by them. As it is of great importance in the case to ascertain precisely the grounds upon which the claim is made, and the grounds upon which the defence is based, I will first proceed to explain them.

The plaintiff states in her petition of plaint as follows :—

"1. That the properties mentioned in the accompanying schedules form part of the estate of Lala Baldeo Sahai, deceased, who, being childless, declared Prem Sukh Das in his lifetime to be his adopted son and heir, solemnly executing a will in his favour in 1875. He died in December, 1878.

"2. That on the death of Lala Baldeo Sahai, the plaintiff and the defendant undertook to maintain Prem Sukh, minor, and to look after the affairs connected with the property.

"3. That Prem Sukh Das, who had not contracted a marriage, died during his minority, on the 3rd December, 1879.

"4. That the parties, who are the widows of Lala Baldeo Sahai, and mothers of Prem Sukh Das, obtained joint possession of all the moveable and immoveable properties, and lived together in commensality."

That is, in her petition of plaint she says in effect that, at the time of the death of Baldeo Sahai, he left an adopted son as his heir. Plaintiff and respondent took possession of the estate of Baldeo Sahai on behalf of Prem Sukh Das, the adopted son, who was a minor. The minor died a year after. Since then the plaintiff and defendant remained in joint possession of the estate. Now the defendant is dealing with the property in a way to which she (the plaintiff) objects, and she asks for a division of the estate between them.

The defendant pleads that "Prem Sukh Das was not an adopted son of Baldeo Sahai, nor could he be adopted ; the disputed property was acquired by him under a will executed by Baldeo Sahai. The plaintiff has no right in respect of the property in suit, and her claim in respect of it should be dismissed."

The parties went to trial upon the question of adoption, and in proving that Baldeo Sahai had adopted the minor Prem Sukh

as his son, it was proved that Prem Sukh was the son of Baldeo Sahai's sister. It is not necessary for us to consider the evidence as to the fact of adoption. The question is, had the adoption of his sister's son by Baldeo Sahai any legal validity? Baldeo Sahai himself had doubts about its validity. The will would not have been necessary had the adoption been a good one.

We have then to consider what was the position of the two ladies on the death of Baldeo Sahai. A form of adoption had been gone through and a will made. Prem Sukh was entitled to the same interest either under the will or by reason of the adoption. Whoever got possession of the estate, got it on behalf of Prem Sukh.

Both the ladies state that they maintained and brought up Prem Sukh, and they got their names registered as mothers of Prem Sukh.

During the lifetime of Prem Sukh, then, the two ladies were in possession of the minor's property, whom they recognised as their son. The result of this is, that they constituted themselves trustees for the minor. As such, they continued to be in possession of the property till the death of the minor in December, 1879. After his death they continued in possession. They placed themselves in the position of his mothers, and as heiresses to him, and not in the position of the widows of Baldeo Sahai. That is the right which both claimed in the property, and upon the basis of which they remained in possession of the estate since the death of Prem Sukh.

Two contentions have been raised before us. The first is that the two widows are actually heirs; that the adoption was legal and valid; and that Prem Sukh was therefore the son of Baldeo Sahai and his two widows.

The question then is, can a Brahman (for the parties in this suit are Brahmans) in this country validly adopt his sister's son?

It is urged that the earlier authorities on Hindu Law do not prohibit such an adoption; that the view taken by the two *Mimansas* is opposed to these earlier authorities; and that the ancient texts upon which the *Mimansas* profess to base their view do not support that view. It is admitted that all the Courts have hitherto

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adopted the view which the *Mimansas* take; but it is urged that as that view is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two *Mimansas*, and we are bound to follow the authority of a long and uniform course of decisions. Sitting as a Division Bench of this Court, it is not competent for us to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point. If the respondent wishes to re-open the whole question, she must go to the Privy Council. It must therefore be held that the adoption of Prem Sukh Das was invalid, and that upon the death of Baldeo Sahai he took the estate under the will.

The question then arises:—What is the position occupied by the two ladies since Prem Sukh's death? They had no rights as mothers. They took possession of the estate on behalf of Prem Sukh, and their possession was that of trustees on his behalf. They remained in possession as heiresses, and as such set up a claim to his estate. That claim has failed.

It is then contended that, even allowing that they have no right to the property as the heiresses of Prem Sukh, still, inasmuch as they are in possession of the estate, they are competent to maintain a suit for its partition between themselves. Various authorities have been cited in support of this contention.

The first case cited to us was the case of *Armory* v. *Delamirie* (1.) We were also referred to some of the cases mentioned in the note to this case.

Now in the first case, the plaintiff, who was a chimney sweeper's boy, had found a jewel. He carried it to the defendant's shop, and delivered it into the hands of the defendant's apprentice. The apprentice, under the pretence of weighing it, took out the stones, and returned the empty socket. In an action for trover by the plaintiff, it was held in this case that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all except the rightful owner.

Now in that case no false claim was set up: the claim was a claim to bare possession.

(1) Smith's L. C. 6th edn., 313.

The other case cited was *Asher* v. *Whitlock* (1), a case relating to land.

In that case a person had enclosed from the waste of a manor a piece of land by the side of the highway in 1842. In 1850 he enclosed more land adjoining, and built a cottage. He occupied the whole till his death in 1860. By his will this person devised all his property to his wife for and during so much of her natural life as she might remain unmarried, and from and after her decease or second marriage, whichever event might first happen, to his only daughter in fee. After the death of this person, his widow remained in possession with the daughter, and in 1861 married the defendant. Early in 1863 the daughter died, and the mother also died soon after. The defendant continued to occupy the property, and the heir-at-law of the daughter brought this suit for ejectment against him. It was held in that case that a person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land and cannot show title or possession in any one prior to the testator Possession is a good title against all the world, except against one who can show better title. By reason of his possession such person has an interest which can be sold or devised. If this person had devised his interest to two others, they might divide it among themselves.

In this case there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. We cannot recognize such a claim; to do so would be to recognize an illegal transaction, and we should be dividing an estate which has no legal existence. The suit is not maintainable, and we must allow this appeal, and dismiss the connected appeal No. 55 of 1884. No costs on either side in any of the Courts.

BRODHURST, J.—The plaintiff, the younger widow of Baldeo Sahai, Brahman, instituted a suit in the Court of the Subordinate Judge of Saháranpur against the defendant, the elder widow of the said deceased person, for partition, and for separate and complete possession of a half share of certain houses, and for other reliefs as contained in the plaint.

(1) L. R. 1 Q. B. 1.

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The Subordinate Judge partly decreed and partly dismissed the claim, and from his decree the defendant has now appealed.

It is proved that Baldeo Sahai went through the form of adopting Prem Sukh, his sister's son, and, subsequently having reason to believe that such an adoption was invalid, he, on the 21st July, 1875, executed a will in favour of Prem Sukh.

Baldeo Sahai died in 1878, and Prem Sukh succeeded to possession of his estate; but he died in 1879 during his minority.

The adoption of a sister's son by one of the twice-born has been held in numerous rulings, and by every one of the High Courts in India, to be invalid under the Hindu Law, and the proposition of the plaintiff-respondent's learned counsel to the contrary, in my opinion, has not been and cannot be sustained.

The plaintiff-respondent did not obtain possession of the property in suit as a widow of Baldeo Sahai, but Prem Sukh succeeded to possession under the will, and on his demise the plaintiff was not entitled to the property, and had no right to bring the suit.

I therefore concur with the learned Chief Justice in allowing the appeal and in dismissing the suit without costs.

Appeal allowed.

PRIVY COUNCIL.

P. C.
J. C.
1885
June 19.

ALEXANDER MITCHELL (DEFENDANT) *v.* MATHURA DAS AND OTHERS (PLAINTIFFS.)

[On appeal from the High Court for the North-Western Provinces]

Act III of 1877, (*Registration Act*), *ss.* 17, 49.—*Effect of a registered instrument confirming a prior one of the same purport not registered.*

An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section *b* of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being unregistered,

Present: SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act.

Appeal from a decree (16th January, 1882) of the High Court (1), reversing a decree (9th September, 1880) of the District Judge of Cawnpore.

The respondents, who had obtained a decree for Rs. 2,036, dated the 9th June, 1879, under an arbitration award against William Mitchell, formerly carrying on the business of cotton-screwing at Cawnpore, in execution attached the screwing-house and a bungalow adjoining in his occupation. Alexander Mitchell, resident in Scotland, father of William Mitchell, claimed the property as owner, alleging that the latter was merely his tenant; and obtained its release on the 11th August, 1879, under s. 280 of Act X of 1877 (Civil Procedure Code). Another son, Francis J. Mitchell, took possession as agent for his father.

On the 14th June, 1880, Mathura Das and others, now respondents, holders of the decree of the 9th June, 1879, sued both William and Alexander Mitchell, to obtain establishment of right in the property in dispute (in accordance with the right of suit given in s. 283), on the ground that the property belonged exclusively to William. The defence was that the elder Mitchell had purchased from Messrs. Nicol, Fleming and Co., in 1873, and had continued to be owner.

The District Judge, into whose Court the suit was transferred, found that the property in suit, which was of upwards of Rs. 12,000 in value, had been acquired in good faith by A. Mitchell, the father, on payment of Rs. 12,406-12-0 to Messrs. J. Nicol, Fleming and Co., in September, 1873, as an investment for himself, and with the object of enabling his son, William Mitchell, whose possession thereof after such purchase was merely permissive, to make a favourable start in business; that the deed of the 25th September, 1873, was not produced for registration, through oversight, but that such omission had been supplied by the execution of the deed of the 31st December, 1878, to which the earlier deed was appended as a schedule; that the two instruments formed, in truth, one document, which was validly registered; and that if there were any

(1) I. L. R., 4 All. 206.

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irregularity or defect in such registration by reason of the certificate of registration not being endorsed on the paper on which the later deed was written, such defect or irregularity was one merely of procedure, and did not render the registration of the document invalid. The Judge also found that, even if the registration were invalid and the deed inadmissible in evidence, there was enough to show that the property belonged to the elder Mitchell. The suit was accordingly dismissed.

The plaintiffs having appealed, the High Court found, with reference to a mistake under which the Registrar's certificate had not been written on the confirming document, but on the schedule containing the deed of 1873, that the provisions of ss. 58, 59, and 60 of Act III of 1877 had not been complied with. They concluded, therefore, that neither of the documents was admissible in evidence, and that in admitting that of 1878 the Judge had decided erroneously. They intimated that there was much force in the suggestion of the counsel for the plaintiff, that registration of the deed of 1873 was intentionally not made, in order to let it appear that William Mitchell was the owner of the premises. The material part of the judgment is set forth by their Lordships.

The claim having been decreed in the High Court, Alexander Mitchell appealed to Her Majesty in Council.

For the appellant, Mr. *R. V. Doyne*, and Mr. *Woodroffe* argued that any *primâ facie* case of ownership on the part of William Mitchell, consequent on his having been seen in occupation, had been rebutted by proof of the purchase of the property by his father. The title of the latter was established by the deed of the 31st December, 1878, which with its schedule was admissible in evidence. That the endorsement of the Registrar was on the wrong document was not a material mistake, and did not invalidate the registration.

Reference was made to Act III of 1877, *Muhammad Ewaz* v. *Birj Lal* (1), *Sah Makhan Lal Panday* v. *Sah Kundan Lal* (2).

The respondents did not appear. Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Their Lordships are of opinion that the decision of the High Court in this case was erroneous, and that it ought to be reversed.

(1) L. R., 4 Ind. Ap. 166. (2) L. R. 2 Ind. Ap. 216.

It appears that an action was brought on the 14th June, 1880, praying:—"That a decree for establishment of right, as provided by s. 283 of Act X of 1877, be passed, with the order that the disputed property is the property of W. Mitchell, judgment-debtor, and is liable to be sold by auc ion in execution of the plaintiff's decree" On the 11th June, 1879, the plaintiffs obtained a decree under an arbitration award against William Mitchell. In execution of that decree a screw-house, which was in the possession of William Mitchell, was attached. Upon that attachment being made, Alexander Mitchell, the father of the defendant William, objected, and claimed that the property was not the property of William, but was the property of him, Alexander. The matter was investigated by the Court out of which the execution issued, in accordance with the provisions of the Code of Civil Procedure; and having received evidence in the case, the Court decided that the property belonged to Alexander and not to William, and released it from execution. That order was not appealable; but the plaintiff, the then execution creditor, being dissatisfied with the order, the present suit was commenced, in accordance with the provisions of the Code of Civil Procedure, to have it declared that the property was the property of the son, and liable to be seized in execution; it was in substance to reverse the order of the Court out of which the execution issued.

The way in which the father endeavoured to make out his title was this:—He said that on the 25th September, 1873, he purchased the property from Messrs. Nicol, Fleming and Co. It appears that the deed of conveyance which he attempted to put in evidence to prove that Messrs. Nicol, Fleming and Co. conveyed the property to him had not been registered. By the Registration Act—Act III of 1877, s. 49—it is enacted that "no document required by s. 17 to be registered,"—and the document of 1873 was a document of that nature—"shall, unless it be registered, be received as evidence of any transaction affecting such property or conferring such power." The deed, therefore, not having been duly registered, was not admissible in evidence. But Alexander Mitchell produced a subsequent deed, namely, a deed which was executed on the 31st December, 1878. That deed is set out in the record. It refers to the deed of 1873, which is set out in a schedule as part of the deed of 1878. The memorandum of registration was written, not on the

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first sheet of the deed of 1878, but at the end of the deed which was annexed as a schedule to, and was consequently part of the deed of 1878. The deed of 1878 not only confirmed the deed of 1873, but it went on to state that the parties to the deed did, and each of them did, "according to their and his respective estates and interests, grant, convey, assign, and confirm unto the said Alexander Mitchell, his heirs, executors, administrators and assigns, the piece or parcel of land" which is the subject-matter of the dispute in this case. So that the deed of 1878 was an actual conveyance from Messrs. Nicol, Fleming and Co. to Alexander Mitchell. Nicol, Fleming and Co. were proved to have purchased it from Gavin Sibbald Jones, who had mortgaged it to a person of the name of Churcher. There is no doubt that the property, having been the property of Nicol, Fleming and Co., passed by that deed from Nicol, Fleming and Co. to Alexander Mitchell. But it was alleged in the plaint that that deed was fraudulent and void. The fourth paragraph of the plaint says:—"The said property belongs exclusively to W. Mitchell, and he is in proprietary possession thereof; the sale deed is quite fictitious, collusive and invalid, and executed without receipt of consideration money." It is not attempted to impute any fraud to Nicol, Fleming and Co. They received the consideration money of Rs. 12,406 and conveyed the estate. The fraud attempted to be made out is that the conveyance was to Alexander Mitchell instead of the son, William Mitchell. The question is, who paid the consideration money for the conveyance? Was it William Mitchell or Alexander Mitchell? There is no evidence to show that William Mitchell had the means of purchasing the property. He had been acting merely as assistant of Nicol, Fleming and Co., in conducting the mill for them before the sale, and he continued to occupy the premises afterwards.

It was proved that the consideration money for the conveyance was paid by Alexander Mitchell. It was not paid by William Mitchell in Cawnpore, but to Nicol, Fleming and Co. in England by Alexander Mitchell, who lived in Scotland.

There was no evidence whatever to show that William Mitchell was the real purchaser, or that Alexander was merely benami for him; and their Lordships think that the decision of the first Judge,

that the property was Alexander Mitchell's and not William Mitchell's, was correct.

It has been urged by Mr. Woodroffe, and very properly urged, that it required some strong evidence to overturn the decision of the Judge of the execution Court, who, upon hearing the evidence, came to the conclusion that the property was Alexander Mitchell's; and he asked—Was there any sufficient evidence that it was the property of William given before the Judge of the first Court, who decided in accordance with the view of the Court of execution? There appears to be no evidence. The evidence, on the contrary, shows that the money was paid by Alexander.

The Judges of the High Court place some reliance upon the fact that the first deed was not registered in 1873. They say:—"Having established this lengthened possession on the part of their judgment-debtor, the plaintiffs, reasonably enough, contend that they have made out a *primâ facie* case, which it lies upon the defendants to rebut. We think that this is the correct view of the position, and that it rests with Alexander Mitchell to prove his title. This he seeks to do in a fashion which is, to say the least of it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th September, 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence." That document was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence, and that deed, referring to the deed of 1873, was proved to have been executed, and their Lordships consider that it was duly registered. "Now it is obvious"—the Judges say—"that the true document of his title is the conveyance of 1873; but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March, 1879, it was presented to the Collector for registration. Now, even supposing registration had been formally and properly completed, we should

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have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed." Their Lordships do not understand what is the mischief to which the Judges allude. The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances, unless those previous conveyances were registered. The Registration Act, as regards real property, was not intended to be a clause similar to that which is in the Bankrupt and Insolvent Acts, by which persons who are allowed to be in the order and disposition of goods, with the consent of the real owners, are, as against creditors, to be conconsidered the real owners.

Their Lordships therefore think that the second deed of conveyance, being registered, was a valid conveyance of the property from Messrs. Nicol, Fleming and Co. to Alexander Mitchell, and that it passed that property to Alexander, unless there was fraud either between those who conveyed the property to Alexander, or between Alexander and his son, in taking the conveyance to Alexander as the person who had really purchased the property, instead of to the son, who was in possession of the property, and who it is said paid the purchase money. Their Lordships see no evidence at all to show that there was any fraud of that kind, or between Alexander and his son, in having the confirmation deed of 1878 executed to the father.

With reference to the persons who paid the money, it was stated by the brother of William that the father had advanced the money for the purpose of promoting the interests of his son. There was some evidence given of rent having been paid by William Mitchell to his father for this property. It certainly was not very clearly proved that the rent was regularly paid. It was said there were letters showing that the different payments had been made,

but those letters were not produced. There certainly was one letter produced, in which Messrs. Nicol, Fleming and Co. admitted to have received a sum of Rs. 2,000 from William, in order to make a remittance to the father of £150. But the Judges put it in this way :—"Not a single entry under the head of 'rent' in the account-books of the firm of Mitchell and Co. is forthcoming, nor is a letter or receipt produced from Alexander Mitchell acknowledging any one of the payments which are alleged to have been made on account of rent. That moneys may have from time to time been remitted from Mitchell to his father, by way of interest on the advances made to start him in business, is likely enough; but, be this as it may, there is not a particle of satisfactory proof to show that rent was ever paid by William Mitchell to his father in respect to the screw-house." Whether the rent was ever paid by William Mitchell to his father is not the question. The question is, who paid the consideration money for the conveyance from Messrs. Nicol, Fleming and Co. to Alexander? Their Lordships think that the evidence clearly shows that the consideration money was paid by the father, and that he took the conveyance to himself. There was no evidence to show that the father lent the money to his son, and that the son was the real purchaser. Even if the father lent the money to the son, it is natural that he should take the conveyance to himself as a security for the repayment of the loan.

Under these circumstances, their Lordships are of opinion that the *primâ facie* case, which was made out by showing that William Mitchell was in possession, has been rebutted by the evidence showing that the father paid the consideration money for the conveyance to himself, and that the property was conveyed to him. Their Lordships therefore think that the decison of the Judge of the execution Court, that the property was the property of Alexander, and not the property of William, was correct, and that this suit must fail in asking to have that judgment reversed. The Court of first instance, in the suit which is now under consideration, concurred with the decsion of the Judge of execution.

Their Lordships think the decision of the first Judge was correct, and that the High Court were in error in reversing that decision.

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Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to order that the suit be dismissed with the costs in the High Court. The costs of this appeal must be paid by the respondents.

Solicitors for the Appellant—Messrs. *Sanderson* and *Holland*.

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APPELLATE CRIMINAL.

Before Mr Justice Brodhurst.

QUEEN-EMPRESS v. SUKHA AND OTHERS.

Criminal Procedure Code, ss 423, 436, 439—Appellate Court, powers of—Commitment.

The appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

The meaning of the words in s. 423 (*b*) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial," is as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session, has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

IN this case five persons, named Durga, Sukha, Ballu, Ram Din, and Dhani, were originally tried by the Deputy Magistrate of Pilibhít, a Magistrate of the first class, under s. 325 of the Penal Code, for intentionally causing grievous hurt to one Misri. Durga was, on the 4th March 1885, acquitted, and the remaining four were convicted of the offence above-mentioned, and they were each sentenced to be rigorously imprisoned for three months, and to pay a fine of Rs. 10, or, in default, to undergo a further term of one month's rigorous imprisonment.

The four prisoners preferred an appeal to the Sessions Judge, who, in an order dated the 16th April 1885, observed that the sen-

tences that had been passed by the Magistrate were "wholly inadequate for the offences of which appellants have been found guilty by him;" and he added:—"Two courses appear open to me—one to report the case to the High Court for enhancement of punishment; the other, under s. 423 of the Criminal Procedure Code, to direct the committal of the appellants to this Court, sitting as a Court of Session, for trial. The latter course appears to me to be the most appropriate in the present instance. The Magistrate's order is accordingly annulled, and he is directed to commit the appellants to this Court for trial."

The four prisoners were accordingly committed to the Court of Session, and tried by the Sessions Judge under s. 325 of the Penal Code, and also under s. 335, for causing grievous hurt on grave and sudden provocation; and the Sessions Judge, on the 12th June, 1885, convicted the four accused persons under the latter section, and sentenced them each to two years' rigorous imprisonment, inclusive of the terms they each had already undergone under the orders of the Deputy Magistrate.

The four prisoners appealed to the High Court. They were not represented either by counsel or pleader, and they did not take any special objection either of law or fact to their convictions and sentences.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

BRODHURST, J., (after stating the facts as above, continued):—When the case came before me for hearing, I saw reason to doubt the legality of the Sessions Judge's proceedings, and, at my request, first the Senior Government Pleader, and subsequently the Public Prosecutor, appeared to argue the legal point that arises in the case.

The point for consideration is, whether the Sessions Judge was, as he supposes, competent, when the appeal was preferred to him, to have adopted either of the courses he mentions; or was merely empowered, if he considered the sentences inadequate, to have dismissed the appeal, and to have referred the case to the High Court for enhancement of sentences, under s. 439 of the Criminal Procedure Code.

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Had Act X of 1872 been still in force, the Sessions Judge, in disposing of the appeal, might, under the provisions of s 280 of that Code, have enhanced the sentences to any punishment that the Magistrate of the first class was competent to inflict—*i. e*, to imprisonment of either description not exceeding two years and fine, or he might, under the same section amended by s. 28 of Act XI. of 1874, have ordered the appellants to be re-tried; but he could not have ordered their commitment under s. 284, because their offence was triable by the Magistrate of the first class. It was only in sessions cases, in which the Court of Session considered that an accused person had been improperly discharged, that it was competent, under s. 296, to direct that the accused person be committed for trial, and, under the same section, the Court was empowered to report the proceedings for the orders of the High Court, if it was of opinion that the punishment was too severe or was inadequate.

The High Court of these Provinces held on more than one occasion, as will be seen by referring to the judgment of Jardine, J., in *Queen* v. *Seetul Pershad* (1), that the Court of Session can only order the commitment of an accused person in cases exclusively triable by it; and I entertain no doubt that this was a correct exposition of the law during the time that Act X of 1872 was in force.

Act X of 1882 did not, so far as I am aware, extend the powers of the appellate Courts; on the contrary, it curtailed them by depriving those Courts of the power of enhancing sentences. That power was, by s. 439 of the Criminal Procedure Code now in force, conferred, under certain restrictions, solely upon the High Courts as Courts of revision. Under the latter section it is laid down that "where the sentence dealt with under this section has been passed by a Presidency Magistrate or a Magistrate acting otherwise than under s. 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class."

Had the Sessions Judge referred the case under appeal to this Court for orders, the sentences could not have been enhanced to

(1) N.-W. P. H. C. Rep., 1873, p. 168.

more than a total punishment of two years' rigorous imprisonment and fine—*i. e*, to the punishment that the Magistrate of the first class was competent to inflict.

If the Sessions Judge was competent to order the commitment in the present case, he could do so only under cl (*b*), s. 423 of Act X of 1882. If he is empowered by that section to order the commitment, the result of the amendment of the Criminal Procedure Code is that, whilst the Court of Session is, by Act X of 1882, deprived of the power of enhancing a sentence of, say, three months' rigorous imprisoment under s. 325 of the Penal Code into a sentence of two years' rigorous imprisonment and fine, it is nevertheless empowered to reverse the conviction under s 325, and the sentence of three months' rigorous imprisonment and fine, to order a commitment under the same section, and to sentence the accused to rigorous imprisonment for seven years and to fine.

The meaning of the sentence "or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial," in cl. (*b*) s. 423 of the Criminal Procedure Code, is, in my opinion, as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be re-tried by a Magistrate of the first class, or by the Court of Session; and, in like manner, when the appellant who was triable solely by the Court of Session has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

Reading ss. 423, 436, and 439 of the Criminal Procedure Code now in force together, I am of opinion that the appellate Court referred to in s. 423 can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

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Under this view of the law, the proceedings of the Sessions Judge are I consider, illegal, and I therefore reverse them.

I nevertheless agree with the Sessions Judge that the sentences that were passed by the Deputy Magistrate were inadequate; I also think that the convictions and sentences contained in the Sessions Judge's judgment are appropriate; and I therefore, under the provisions of s. 439 of the Criminal Procedure Code, direct that each of the four prisoners (appellants) be rigorously imprisoned for two years, under s. 335 of the Indian Penal Code, the sentences commencing from the 4th March, 1885, the date of the Deputy Magistrate's judgment.

CRIMINAL REVISIONAL.

1885. *October* 26

Before Sir W. Comer Petheram, Kt., Chief Justice.

QUEEN-EMPRESS *v.* MITTHU LAL.

Act I of 1879 (*Stamp Act*), *s.* 61—*Abetment of making an unstamped receipt—Act XLV of* 1860 (*Penal Code*), *s.* 107.

A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto

Held that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress* v *Bahadur Singh* (1) distinguished; *Empress* v. *Janki* (2), and *Empress* v. *Bhairon* (3) referred to.

THIS was a case in which one Mitthu Lal was convicted, under s. 109 of the Penal Code and s. 61 of Act I of 1879, of abetment of the offence of making an unstamped receipt.

It appeared that an unstamped receipt had been impounded in the Tahsíldar's Court, and a prosecution of the maker ordered by the Collector. During this trial the Assistant Magistrate summoned Mitthu Lal, and charged and tried him and convicted him. He found that Mitthu Lal had accepted the unstamped receipt and had promised to stamp it, and had thus intentionally aided the illegal omission. The Magistrate sentenced the accused to pay a fine of Rs. 10.

(1) Weekly Notes, 1885, p. 30. (2) I. L. R., 7 Bom. 82.
(3) Weekly Notes, 1884, p. 37.

In reporting the case to the High Court for orders, the Sessions Judge observed as follows :—

"*Empress* v. *Janki* (1) and *Empress* v. *Bhairon* (2) were cited; but he (Assistant Magistrate) was of opinion that these cases had been overruled by the recent decision in *Empress* v. *Bahadur Singh* (3). As each of the Allahabad cases was the ruling of one Judge, he was at liberty to follow either; but the cases do not conflict with each other or the Bombay ruling. There it was held that merely taking an unstamped receipt was no offence. In *Bhairon's* case, the Magistrate found that a bond had been executed on plain paper owing to the obligee's consent to take it. The Judge, in referring the case, said there was no evidence whatever of this, and the conviction was quashed. In the last case, the abettor convicted was a money-lender, who got a debtor to sign an unstamped acknowledgment. Here the abetment is that the payer took the receipt and promised to stamp it. There is evidence of this. It seems a very strained interpretation of the law to say that this is abetment; and it would be just as reasonable to say a payer of money intentionally aids the making of an unstamped receipt by taking it without any promise to stamp it. The conviction should be quashed, I submit: anyhow it is bad, as the prosecution was not sanctioned by the Collector."

PETHERAM, C. J.—I am of opinion that the accused, Mitthu Lal, has not been guilty of the offence of abetment as defined by s. 107 of the Indian Penal Code. The facts, as proved, are that the accused paid a sum of money to a creditor, and that when the money was paid and he was to receive a receipt, the creditor said that he could not give a stamped one as he had no stamp. Upon this the accused accepted a receipt without a stamp, and promised himself to affix one. Upon these facts it is clear that the accused did not aid the offence by any act, because he did nothing; and the only question is, whether he illegally omitted to do anything which he was bound by law to do. As far as I can see, he did all that he could do; he asked for a stamped receipt, and, on being informed that it was impossible to give him one, as the creditor had no stamp, he took the only thing he could get, that is, the

(1) I. L. R., 7 Bom 82 (2) Weekly Notes, 1884, p 37.
(3) Weekly Notes, 1885, p. 30.

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receipt without the stamp. The decision of Brodhurst, J., in the case of *Bahadur Singh* (1) is not in point. In that case the acknowledgment was written in the accused's own book and at his request. The present case is really governed by the other cases cited. The conviction and sentence on Mitthu Lal are set aside. The fine to be refunded if paid.

Conviction quashed.

APPELLATE CIVIL.

1885 November 14.

Before Sir W. Comer Petheram, Kt Chief Justice, and Mr. Justice Straight.

KRISHNA RAM (PLAINTIFF) *v.* GOBIND PRASAD AND ANOTHER (DEFENDANTS)*

Dismissal of suit for non-appearance of plaintiff ordered to appear under s 66, Civil Procedure Code—Rejection of application to set aside dismissal—Appeal—Civil Procedure Code, ss. 66, 103, 107, 540, 588 (8).

A plaintiff who had been ordered, under s 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear, and under s 107, read with s 102, his suit was dismissed He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected He thereupon preferred an appeal from the decree dismissing the suit, under the provisions of s 540.

Held that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Lal Singh* v. *Kunjan* (2) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi *Sukh Ram*, for the appellant.

Mr. *C. H. Hill* and Mr. *G. F. Spankie*, for the respondents.

STRAIGHT, J.—The circumstances of this case appear to be these:—The plaintiff instituted a suit in the Court of the Subordinate Judge of Azamgarh, on the 24th June, 1884, against the defendants, for establishment of his right to certain property which he alleged he had acquired by purchase in 1880, and for a declaration that such property was not liable to be sold in execution of the decree obtained by the defendant Gobind Prasad on the 29th

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* First Appeal No 42 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 4th December, 1884.

(1) Weekly Notes, 1885, p. 30. (2) I. L. R., 4 All. 387.

September, 1883, against the vendors of such property to the plaintiff. The suit, which was originally instituted in the Subordinate Judge's Court, was removed to the file of the Judge of Azamgarh for trial; and on the 15th November, 1884, after settling the issues, the Judge made an order, professedly under s. 66 of the Code, for the attendance of the plaintiff in person at an adjourned hearing on the 4th December following, with certain documents he considered material for the decision of the subject-matters in dispute between the parties. On this last-mentioned date the case was called on before the Judge, and he proceeded to dispose of it in a manner to which I will presently advert. It appears, however, that prior to this the plaintiff had preferred an appeal to this Court against the order of the Judge of the 15th November, 1884, already mentioned, and that appeal was heard by Oldfield and Mahmood, JJ., who set it aside on the 27th January, 1885 (1). The Judge, however, had meanwhile dismissed the suit for want of prosecution, on the ground that the plaintiff had failed to obey his order of the 15th November, 1884; and this decision of his professes to have been passed under ss. 107 and 136 of the Procedure Code. S. 136 had nothing really to do with the matter; and this was pointed out by Mahmood, J., in his decision above referred to; and I think we must now take it that the suit was dismissed for non-appearance of the plaintiff, under s 107 of the Code. It is provided in that section that if a plaintiff or defendant, who has been ordered to appear in person under the provisions of s. 66 or s. 436, does not appear in person or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear. The order dismissing the suit in this case has, therefore, the same effect as if it had been passed under s. 102 of the Code, and the plaintiff's remedy in such cases is indicated by s. 103 of the Code. The plaintiff was well aware of these provisions, for he did apply to the Judge of Azamgarh, under s. 103 of the Code read with s 107, for an order to set the dismissal aside. The Judge refused that application, on grounds which are not before us, and with which we are not concerned

(1) Weekly Notes, 1885, p. 143.

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in this appeal; but it is clear that the plaintiff might have, and ought to have, appealed to us against this last order of the Judge refusing to set aside the dismissal, under s. 588, cl. (8). This he has not done; on the contrary, he has preferred a first appeal as from a decree of the 4th December, which, in my opinion, he was not entitled to do.

It has been held by a Full Bench of this Court in the case of *Lal Singh* v. *Kunjan* (1) that a defendant against whom a decree has been passed *ex parte* cannot appeal from such decree under the general provisions of s. 540, but must adopt the remedy provided in s. 108 of the Code.

For analogous reasons to those given by the majority of the Full Bench in that case, I hold that the plaintiff is not entitled to appeal from the decree of the 4th December, 1884. He very properly applied, under ss. 103-107, to set aside the order of dismissal, and he ought, as I have before observed, to have appealed to us, under s. 588, cl. (8), against the order refusing that application. I may here remark that the propriety of this form of procedure is well illustrated by this case. Had the plaintiff followed it, all that we should have had to decide in his appeal from the order refusing to reinstate would have been as to the sufficiency or otherwise of the grounds made out by him for having the dismissal set aside. As it is, we are asked under the guise of an appeal from decree to determine not only that question but the merits of the case, which have, in fact, never been investigated or tried at all. The really crucial point is, whether the Judge had any right to do what he did under ss. 103-107 of the Code. Seeing that his order of the 15th November, for default in obedience to which he made his subsequent order of the 4th December, was set aside by this Court, it follows as a necessary consequence that had a proper appeal from his order of refusal to set aside the dismissal of the suit been made to this Court, it must have succeeded, with the result that the case would have then been replaced on his file and tried in the ordinary manner. This is precisely what, in my opinion, the law intended, and not that the matter should come up in the inconvenient form of an appeal from a decree. In

(1) I. L. R., 4 All. 387.

this view the appeal must be, and hereby is, dismissed with costs.

PETHERAM, C. J.—I concur in the order proposed by my brother Straight.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell

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THE HIMALAYA BANK, LIMITED, (PLAINTIFF) *v.* THE SIMLA BANK, LIMITED, AND ANOTHER (DEFENDANT) *

Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage deed—Act III of 1877, (Registration Act), s. 50.

The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed.

Held that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal* v. *Bansidhar* (1), *Shahi Ram* v. *Shib Lal* (2), and *Madar* v. *Subbarayalu* (3), referred to.

THIS was a suit brought by the Himalaya Bank, Mussoorie, to recover a sum of Rs. 3,428-7-3, due on a bond, dated the 17th July, 1883, for Rs. 3,000, executed by the defendant No. 1, Mrs. E. McMullen. By this bond, certain land situate in Saháranpur and a dwelling-house thereon of value exceeding Rs. 100 were hypothecated to the plaintiffs. The bond was duly registered on the 10th August, 1883. The defendant No. 1 did not appear to answer the suit. The defendants No. 2 were the Simla Bank Corporation, Limited, who held a bond for Rs. 10,000, dated the 30th June, 1881, in which the defendant No. 1 had hypothecated to them, among other properties, the same dwelling-house as was subsequently mortgaged to the plaintiffs. This bond was executed by all the parties thereto. On the 25th July, 1881, Mrs. McMullen herself took the bond for registration to the office of the Registrar at Mussoorie,

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* First Appeal No. 19 of 1885, from a decree of J. W. P. Watts, Esq., District Judge of Saháranpur, dated the 2nd December, 1884.

(1) Weekly Notes, 1884, p. 136. (2) Weekly Notes, 1885, p. 63.
(3) I. L. R., 6 Mad. 88.

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and in his presence admitted execution and acknowledged receipt of consideration. Two certificates to this effect were endorsed on the bond and signed by the Registrar, who affixed thereto the office seal. At this point it was discovered that no representative of the Simla Bank was present as required by s. 35 of the Registration Act (III of 1877), and the bond was therefore returned to Mrs. McMullen, without the final certificate required by s. 60 of the Act, and without record in the register-book required by s. 61. The bond was passed on to the Simla Bank, and no further steps towards its registration were ever taken. On the 19th December, 1883, the Simla Bank put their bond in suit against Mrs. McMullen and one Moran, who, in execution of a money decree, had attached some of the property hypothecated in the bond. The defendant Mrs. McMullen did not appear, but the claim of the Simla Bank was contested by Moran, who urged that the plaintiffs' bond, being unregistered, was not admissible in evidence. On the 3rd March, 1884, the District Judge of Saháranpur decreed the claim, holding that the bond of the 30th June, 1881 was duly registered in compliance with the Registration Act

On the 31st July, 1884, the present suit was brought by the Himalaya Bank under their bond, alleging as against the defendant No. 1, Mrs. McMullen, non-payment of the debt secured by that instrument, and as against the Simla Bank that they had taken possession of the mortgaged premises in or about the month of May, 1884, and still retained possession; and praying that, in default of payment of the debt due to them, with interest and costs, the said premises might be sold and the proceeds of the sale applied to such payment. The defendants No. 2 appeared and contested the suit, on the ground that under their deed of the 30th June, 1881, and the decree thereon of the 3rd March, 1884, they held a lien on the property which was entitled to priority over that held by the plaintiffs. In reply to this contention, it was argued on behalf of the plaintiffs that the bond of the 30th June, 1881 was not duly registered, and was therefore not admissible in evidence.

The District Judge, re-affirming the grounds of his decision in the case of the Simla Bank v. McMullen and Moran, held that the bond of the Simla Bank was duly registered, and therefore admis-

sible in evidence. He was of opinion that the proceedings before the Registrar at Mussoorie on the 25th July, 1881, amounted to what he described as "inchoate, though not actually completed, registration," and, in reference to his former judgment, he observed:—"I held then, and I hold still, that the bond was, to all intents and purposes, registered; that publicity had been given to it by Mrs. McMullen, the party most interested, inasmuch as she would have to pay the money, herself coming forward to register it, and I may add here that although it was not finally entered in the register, yet any person coming to search the registers to see if there was any lien on the property, could at once have ascertained from the clerk what proceedings, short only of actual and final registration, had taken place in the matter." The learned Judge passed a decree in the following terms:—"I decree now for the plaintiff in full against Mrs. McMullen for a sum of Rs. 3,428-7-3 with costs and future interest at 6 per cent. per annum, *ex parte*, and against the house hypothecated, after the claim of the Simla Bank on its decree shall have been satisfied. The costs of the Simla Bank are payable by the plaintiff Bank to the extent of three-fourths. In all other respects the claim against the Simla Bank is dismissed."

The plaintiffs appealed to the High Court.

Mr. *C. H. Hill*, for the appellants, contended that the District Judge was wrong in holding that the bond held by the respondents had been duly registered in conformity with the provisions of the Registration Act. It was obvious that a document must be either registered or unregistered, and there could be no intermediate position, such as the Judge termed "inchoate" or "imperfect" registration. Under the Registration Act, what constituted registration was the entry in the register-book required by s. 60, and, as no such entry had been made in respect of the defendants' bond, it must be taken to be unregistered, and therefore, under s. 49, to be inadmissible in evidence. Under s. 50, the plaintiffs' bond of the 17th July, 1883, having been duly registered, was entitled to priority over every unregistered document relating to the same property.

Mr. *A. Strachey*, for the respondents, admitted that the finding of the District Judge as to the registration of the bond of the 30th

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June, 1881, could not be sustained. The respondents' title must now, however, be regarded as derived from the decree of the 3rd March, 1884, into which their bond had merged, and not from the bond itself. The terms of s. 50 expressly excluded from its scope questions of priority between registered documents and decrees or orders. The decree required no registration, and, not having been set aside by appeal or otherwise, must, so long as it existed, have all the incidents and effects which the law attached to decrees. *Parshadi Lal* v. *Khushal Rai* (1) was a direct authority; also *Baijnath* v. *Lachman Das* (2). *Kanhaiya Lal* v. *Bansidhar* (3), and *Shahi Ram* v. *Shib Lal* (4) were distinguishable, being cases of competing decrees, and not affecting a question of priority between registered documents and decrees obtained upon unregistered documents.

Mr. *C. H. Hill* was not called on to reply.

PETHERAM, C.—I am of opinion that this appeal must be allowed, and that judgment must be given in favour of the plaintiff. The real question in the case is, whether the title of the Himalaya Bank or that of the Simla Bank should prevail with respect to the mortgages executed by the defendant, Mrs. E. McMullen. The facts of the case are, that on the 30th June 1881, the defendant, Mrs. McMullen, mortgaged a house in Saharanpur to the Simla Bank, to secure a sum of money. The mortgage deed was never registered, and the amount due upon it was never paid off. On the 17th July, 1883, the same mortgagor executed a mortgage-deed in respect of the same house in Saharanpur in favour of the Himalaya Bank, to secure a sum of money, and this deed was duly registered on the 10th August, 1883. There is no finding on the subject, but it must be assumed for the purposes of this case that the Himalaya Bank had no knowledge of the mortgage-deed of the 30th June 1881, which, at the time of their own deed, was not registered.

The first question is, what was the condition of the titles to the property in suit at the time of the registration of the second mortgage-deed? The titles here in question are titles created by two mortgage-deeds. The matter is governed by s. 50 of the Regis-

(1) Weekly Notes, 1882, p. 15.
(2) I. L. R., 7 All. 888.
(3) Weekly Notes, 1884, p. 138.
(4) Weekly Notes, 1885, p. 62.

tration Act, which is in the following terms :—" Every document of the kinds mentioned in clauses (*a*), (*b*), (*c*), and (*d*) of s. 17, and clauses (*a*) and (*b*) of s. 18"—which includes the mortgage deeds before us —" shall, if duly registered, take effect, as against the property comprised therein, against every unregistered document relating to the same property." It is only necessary to read the section to see what was the condition of the titles possessed by the two Banks at the time when the second mortgage-deed was registered. The registered deed of the Himalaya Bank was, by s. 50, given priority over the unregistered deed of the Simla Bank; so that at that time the Himalaya Bank, by virtue of their registered deed and the terms of the statute, was in the position of a first mortgagee, and the Simla Bank was in the position of a second mortgagee. The only interest, therefore, which Mrs. McMullen or the Simla Bank had in the property was what would remain after the debt of the Himalaya Bank had been satisfied. That was the condition of the titles in August, 1883. Upon this state of things, the Simla Bank took proceedings against Mrs. McMullen—to which the Himalaya Bank was not made party—to realise their security, and obtained a decree. Now, at the time when that decree was passed, the interest which Mrs. McMullen had was subject to the Himalaya Bank's mortgage. So that the Himalaya Bank held a first charge on the property, and the Simla Bank held a decree for money against Mrs. McMullen, and against any interest which remained in her after the first charge had been paid off. That was the effect of the decree. Then the present suit was brought by the Himalaya Bank, and the question raised by it is, whether the plaintiffs are entitled to have the property sold to satisfy their mortgage, or whether their mortgage is subject to the decree held by the Simla Bank.

I am of opinion that the decree of the Simla Bank only affected what was left of the property after satisfaction of the mortgage of the Himalaya Bank, and that the Himalaya Bank is therefore entitled to have the property sold.

The authorities on the subject appear to be somewhat at variance with each other. The difficulty arises from the words in s. 50 of the Registration Act immediately following those I have

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already quoted,—"not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." This, in my opinion, means that if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. I do not think that the section can in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. Such an interpretation would lead to manifest injustice, and would defeat the very object with which the registration law was enacted—namely, that publicly registered documents should have effect as against documents not registered. To give priority to a decree obtained against a mortgagor behind the mortgagee's back would be to defeat this object.

I should have thought it necessary to refer the determination of this case to the Full Bench were it not that my brother Tyrrell concurs in the opinion which I have just expressed It appears from the judgment in *Kanhaiya Lal* v. *Bansidhar* (1) that my brother Straight is now of the same opinion. Again, in the case of *Shahi Ram* v. *Shib Lal* (2), Mr. Justice Oldfield and Mr. Justice Mahmood expressed the same view in the following words:—"There is no doubt in my mind that the registered bond of the plaintiff takes effect, as regards the property comprised in it, against the defendant's unregistered bond under s. 50. This gives priority to the incumbrance created by it over the incumbrance created by the defendant's bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds." This precisely expresses the view which I take in the present case; and the same view has been taken by the Madras High Court in *Madar* v. *Subbarayalu* (3).

We therefore have the concurrent opinions of Mr. Justice Oldfield, Mr. Justice Mahmood, Mr. Justice Straight, Mr. Justice Tyrrell, the Madras High Court and myself, that this is the correct construction of the terms of s. 50 of the Registration Act; and under these circumstances I have thought it right to deliver judg-

(1) Weekly Notes, 1884, p 136. (2) Weekly Notes, 1885, p 62.
(3) I. L. R., 6 Mad. 88.

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ment in the case now. The appeal is allowed with costs, and the plaintiffs declared entitled to judgment, that this mortgage be realised as a first charge against the mortgaged property.

TYRRELL, J.—I am of the same opinion, and, having given careful consideration to the terms of s. 50 of the Registration Act of 1877, I accept the interpretation placed on the words "not being a decree or order" by the learned Chief Justice.

Appeal allowed.

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*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.**

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NIHAL SINGH AND OTHERS (PLAINTIFFS) *v.* KOKALE SINGH AND OTHERS (DEFENDANTS) *

Pre-emption—Wajib ul-arz—Right of pre-emptor to stand in the position of the purchaser.

A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held, that it could not be said that the partners of the vendor had not only the right of pre-emption but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village named Pachnan. The clause of the *wajib-ul-arz* relating to pre-emption was in the following terms:—"Up to this time, no case of pre-emption has ever occurred. The practice, however, in the neighbourhood has been that when any co-sharer desires to sell his property, he sells first to the nearest partner, after him to the partner in the *thoke*, then to the partner in the village; failing all these, to a stranger. We also accept this practice." The plaintiffs, Nihal Singh and five other persons, alleged that they were co-sharers in the village with the defendant Girind Singh; that, on the 3rd February, 1883, Girind Singh sold a five annas share out of his ten annas share in the village to the defendants Kokale Singh and Muhabbat Singh, who were "total strangers and inhabitants of a different mauza," for a sum of Rs. 10,000, of

* First Appeal No. 45 of 1885, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th September, 1884.

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which Rs. 6,000 were paid in cash, and, in respect of the balance, a two annas six pies share of the property was mortgaged to the vendor by the vendees; that the sum of Rs. 15,000 was falsely entered in the sale-deed as the consideration for the sale; and that in order to defraud the plaintiffs, the defendants executed and registered a false and collusive mortgage deed in respect of the remaining two annas six pies share, for Rs. 5,000. The defendants pleaded in reply that the ten annas share of Girind Singh constituted a mahál distinct and separate from that constituted by the plaintiffs' share in the village, and that the plaintiffs were therefore not entitled to pre-emption under the terms of the *wajib-ul-arz;* that the plaintiffs had refused to purchase the property in dispute; and that the consideration for the sale was correctly stated in the sale-deed as Rs. 15,000, out of which Rs. 6,000 had been paid in cash and the balance secured by two mortgage-deeds for Rs. 4,000 and Rs. 5,000 respectively.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the claim for pre-emption, but found that the true consideration for the sale was Rs. 15,000 as stated in the sale-deed, and that the plaintiffs' allegation that the mortgage-deed for Rs. 5,000 was false and collusive had not been substantiated by the evidence. The Court therefore passed the following decree:—"It is ordered that the plaintiffs' claim for possession of the property in dispute be decreed. The plaintiffs should deposit in this Court Rs. 15,000, full sale-consideration, within twenty days from the date this decision becomes final. As the plaintiffs denied the correctness of the sale-consideration, and the defendants denied the plaintiffs' right of pre-emption, each party will bear its own costs. If the plaintiffs fail to pay the sale-consideration within the appointed time, their suit shall stand dismissed, and the costs of the defendants, with interest thereon at eight annas per cent per mensem, will be charged to them."

From this decree the plaintiffs appealed to the High Court. It was contended on their behalf (i) that the Court of first instance was wrong in holding that the consideration for the sale was the amount stated in the sale-deed, and (ii) that "the appellants, pre-emptors, are entitled to be placed exactly in the same position

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as the vendees. The lower Court's decree, directing possession to be given to the appellants on payment of full consideration, is erroneous."

Pandit *Nand Lal*, for the appellants.

Mr. *T. Conlan* and Munshi *Kashi Prasad*, for the respondents.

PETHERAM, C. J.—I think that this appeal must be dismissed and the decision of the Court below affirmed. The suit is to enforce a right of pre-emption. The plaintiffs and the vendor are co-sharers. The co-sharers who are defendants in the suit sold to the other defendants, who are strangers, the amount of consideration being Rs. 15,000. They made a bargain with the defendants-vendors that a portion of the purchase-money should remain on credit. The plaintiffs obtained a decree. They are the appellants before the Court, and they urge that they must have the same credit in respect of payment of the purchase-money as that arranged between the vendors and the vendees-defendants. I do not think that is the meaning of the *wajib-ul-arz*. The stranger and the vendors made some particular bargain regarding the payment of the purchase-money, with which the pre-empting plaintiffs had nothing to do. I do not think it possible to say that the plaintiffs have not only the right of pre-emption, but also the right to be put in the same position, with reference to all the peculiar incidents of the payment of the purchase-money, as that arranged by the vendors and the vendees. The decision of the lower Court is affirmed, and this appeal is dismissed with costs, except that the plaintiffs are to be allowed twenty-one days to deposit the purchase-money, reckoning from the day on which the decree of this Court reaches the lower Court.

TYRRELL, J.—I concur.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

1885. *November 23.*

WAJID ALI SHAH (DEFENDANT) v. DIANAT-UL-LAH BEG (PLAINTIFF).*

Suit for declaration that property is wakf—Act XX of 1863, ss. 14, 15, 18—Civil Procedure Code, s. 539—Act I of 1877 (Specific Relief Act) s. 42.

A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege him-

* First Appeal No. 48 of 1885, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 13th January, 1885.

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self to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was *wakf*.

Held that, unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained.

Held that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863, or under s. 539 of the Civil Procedure Code.

Held that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (Specific Relief Act).

Held, therefore, that the suit was not maintainable.

Held, further, that, the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable.

THE defendant, Wajid Ali Shah, was in possession of certain property situate in the city of Gorakhpur, and consisting of an imambara, a mosque, and an eedgah. In 1880 the plaintiff, Dianat-ul-lah Beg, brought a suit against him, upon the allegations that the property did not belong to the defendant, but was an endowed property, of which he had improperly assumed the management, and in respect of which he had improperly obtained mutation of names in his favour from the revenue Court; and that the defendant had mismanaged and wasted the property and misappropriated its income. The plaintiff accordingly prayed that Wajid Ali Shah might be removed from the management. In reply, the defendant filed a written statement, dated the 26th August, 1880, in which he denied that he was in possession of the property as manager only thereof, and also that the property was *wakf*, claimed to hold as proprietor. The suit was dismissed on the 30th September, 1880, for deficient payment of court-fee on the plaint. On appeal, the High Court, on the 8th July, 1881, dismissed the appeal in the following terms:—"The deficiency not having been made up as ordered, the appeal is struck off."

The present suit was brought by the same plaintiff against the same defendant for a declaration that the property in question was *wakf*. He claimed to be interested in the property as a Muhammadan, and interested in the worship at the mosque and eedgah,

and in the good resulting from the imambara; and stated as the cause of action the denial by the defendant, in his written statement in the former suit, that the property was of the character alleged by the plaintiff. In reply, the defendant raised contentions substantially the same as those which were put forward on his behalf in the former suit.

The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim. On appeal by the defendant to the High Court, it was contended on his behalf, *inter alia*, that the suit was not maintainable.

Mr. *T. Conlan*, Munshi *Hanuman Prasad* and Sheikh *Mehdi Hasan*, for the appellant.

Lala *Lalta Prasad* and Maulvi *Hashmat-ul-lah*, for the respondent.

PETHERAM, C. J.—I am of opinion that this appeal should be allowed, and the ground upon which I wish to base my judgment, is that the action as brought is not maintainable, whatever the facts may be. I desire to guard myself against expressing any opinion upon the question whether the property in dispute is or is not *wakf*. If it were necessary to consider that point, I think that a new trial would be necessary, in order that evidence might be adduced to determine the true character of the property. The evidence on the record is wholly insufficient for the determination of this question, and I therefore refrain from expressing any opinion in regard to it. I confine myself to saying that, under any set of circumstances which have been suggested in this case, the action is not maintainable.

The action is one of which the character has been formulated by the plaintiff himself in his plaint. He begins by stating that he is a Muhammadan. He then goes on to say that there is certain property situated in the Gorakhpur district, of which he is not a resident, and that this property is *wakf*, and is in the defendant's possession. He proceeds to state that, on the 26th August, 1880, the defendant in certain legal proceedings asserted a title to the property, which was inconsistent with its character being *wakf*. He therefore claims a decree, declaring that the property in the defendant's possession is in the defendant, but that it is *wakf*.

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I am of opinion that unless it can be shown that the action is maintainable under some statute, it cannot be maintained; and the question therefore is, whether there is any statute which enables such an action to be brought.

Now Act XX of 1863 is an Act which provides for the management of religious endowments, and ss. 14, 15 and 18 provide a machinery by which the rights and powers of trustees in reference to such property may be ascertained. Again, the Civil Procedure Code, s. 539, provides a procedure for ascertaining the rights of trustees of public property. The question then is, whether the present suit can be brought under the provisions of either of these statutes.

When these provisions are considered, it is obvious that the suit is not maintainable under any of them, because under them it is necessary that some permission should be given to the plaintiff to bring the suit. It is admitted that, in the present case, no such permission was obtained. So that the plaintiff in effect admits that this suit was not contemplated by either of the Acts I have mentioned. The only other provisions that could apply to the subject are those of s. 42 of the Specific Relief Act, which gives to persons who are entitled to certain interests the right to bring suits for the declaration of such interests.

As I have already observed, the only right asserted by the plaintiff is his right as a Muhammadan to have the property kept as *wakf* for the general body of persons who believe in the Muhammadan religion. S. 42 of the Specific Relief Act applies to "any person entitled to any legal character or to any right as to any property," and, in certain circumstances, allows such a person to bring a suit for a determination of his title to such character or right. But the scope of the section is confined to the two classes which it specifies. The plaintiff in this case cannot sue as one of the first class, because he has no "legal character" which is denied by any one: he only asserts his character as a Muhammadan, and that has not been questioned. Nor does he for himself assert a right as to any property, and by no act of the defendant has his right to any property been denied.

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The suit therefore does not come under the provisions of s. 42, and as it is not contemplated by either of the other statutes to which I have referred, I am of opinion that it is not maintainable. I may add that even if it were possible to hold that the suit was maintainable under s. 42 of the Specific Relief Act, I am of opinion that this is not a case in which this Court, in the exercise of its discretion, would be disposed to grant relief. Under s. 42, such relief is always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself shows that the defendant was using the property for charitable purposes, I do not think that it would be proper to pass such a decree as the plaintiff asks for, even if he could bring the suit. Under these circumstances the appeal must be decreed with costs.

OLDFIELD, J.—I am of the same opinion.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Oldfield.

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AFZAL-UN-NISSA BEGAM (PLAINTIFF) *v.* AL ALI (DEFENDANT).*

Civil Procedure Code, Chapter XV, s. 191—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.

A Subordinate Judge having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed.

Held that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity.

Held also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

Jagram Das v. *Narain Lal* (1) referred to.

THE facts of this are sufficiently stated for the purposes of this report, in the judgment of Petheram, C. J.

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* First Appeal No. 29 of 1885, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 23rd December, 1884.

(1) I. L. R., 7 All. 857.

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Munshi *Hanuman Prasad* and Mir *Zahur Husain* for the appellant.

Pandits *Ajudhia Nath* and *Sundar Lal*, for the respondent.

PETHERAM, C. J.—I am of opinion that this case must go back to be tried by the Subordinate Judge of Moradabad, on the ground that nothing that can be called a judgment by a Judge trying the case has ever been given. The observations which I made in *Jagram Das* v. *Narain Lal* (1) are applicable to the present case, and the considerations which then weighed with me, affect my mind now in the same manner. I should not have thought it necessary to add anything to the observations which I made on that occasion, if I had not been informed that my judgment had led to some confusion as to the mode in which cases of this kind should be dealt with. The only addition I propose to make to my former observations is by pointing out what appears to me to be the course which should have been adopted in the present case, which is a fair illustration of what commonly happens.

The suit was instituted on the 25th May, 1883, in the Court of the Subordinate Judge of Moradabad, an office which was then filled by Maulvi Nasir Ali Khan. It went through the ordinary course of the proceedings necessary for fixing issues and ascertaining the matters to be tried. Maulvi Nasir Ali Khan fixed a date for proceeding with the evidence, and accordingly on various occasions he sat for the purpose of taking evidence, and on the 17th April, 1884, the taking of evidence was concluded before him. He then heard everything that was brought before him, and he directed that an account should be prepared in the office. After this, various adjournments took place for various reasons which it is not necessary to mention, until the 20th September, 1884, which was a date fixed by him for the disposal of the suit before himself, the evidence being then complete. Upon the 20th September there was a proceeding to the effect that there was no time for disposing of the case on that day, and making a further adjournment to the 9th December. That proceeding seems to be of the kind which is generally adopted when an adjournment is necessary. When the 9th December arrived, the case would be taken up as adjourned from the 20th September, 1884, which was

(1) I. L. R., 7 All. 857.

itself the date of an adjournment from the date originally fixed by the Subordinate Judge for the hearing of the case. That original date would be the date of the hearing, and all subsequent dates would be those of adjournments. What took place on the 9th December, therefore, would be a proceeding held by adjournment in the trial heard on the original date.

Now, when the 9th December arrived, Maulvi Nasir Ali Khan had left Moradabad, and was succeeded in the office of the Subordinate Judge by Maulvi Zainulabdin. When the case was called on, it was his duty to try it. The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him.

The question then arises—What was the duty of Maulvi Zainulabdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date, he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself.

For these reasons, I am of opinion that the trial of this case is a nullity, and that the case must be remitted for trial by the

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AFZAL-UN-NISSA v. AL ALI.

Subordinate Judge of Moradabad. The costs will be costs in the cause.

OLDFIELD, J.—I am of the same opinion.

Cause remanded.

CRIMINAL REVISIONAL.

1885 *December 2.*

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* GANGA RAM AND ANOTHER.

Act XLV of 1860 (*Penal Code*) *s.* 211—*Prosecution for making a false charge—Opportunity to accused to prove the truth of charge.*

A complaint of offences under ss. 323 and 379 of the Penal Code, was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code.

Held that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government* v. *Karimdad* (1) referred to.

IN this case the petitioners, Ganga Ram and Durga, prosecuted two persons, named Chidda and Chandan, for theft, under s. 379, and assault, under s. 323 of the Penal Code. The complaint was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Joint Magistrate of Aligarh dismissed it, ordered the prosecution of the petitioners under s. 211 of the Penal Code for making a false charge, and sent the case to the Magistrate of the District, who, on the 25th July, 1885, passed an order under s. 195 of the Criminal Procedure Code, referring the case to the Deputy Magistrate for disposal. An application for revision of this order was made to the District Judge of Aligarh, upon grounds which it is not necessary to set forth. The Judge dismissed the application by an order dated the 29th August, 1885. The petitioner applied to the High Court to revise this order on the following grounds:—

"The sanction for the prosecution should not have been given without giving the complainants an opportunity of proving the truth of their case, which was merely thrown out on the report of the police.

(1) I. L. R., 6 Calc. 496.

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QUEEN-EMPRESS v. GANGA RAM.

"It was for the Magistrate alone to ascertain whether the statements of the complainants were credible or not."

Babu *Ram Das Chakarbati*, for the petitioners.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

BRODHURST, J.—One of the grounds for revision is, that sanction under s. 195 of the Criminal Procedure Code should not have been given until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police.

This objection is, I think, valid, and it is supported by the judgment of Garth, C.J., and Field, J., in *The Government* v. *Karimdad* (1). Under the circumstances above referred to, I set aside the Magistrate's order of the 25th July, 1885.

PRIVY COUNCIL.

P.C.*
1885
June 23 *and* 24.

MUHAMMAD ABDUL MAJID (DEFENDANT) *v* FATIMA BIBI (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

Muhammadan law—Will—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation.

Words such as "always" and "for ever," used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will, made by a Muhammadan, gave shares in his property to his surviving widow, son, and grand-children, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates .... All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect, in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will: *held* that, on its true construction, the plaintiff, a sharer under it, was entitled to the full

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* *Present*.—SIR E. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) I. L. R., 6 Calc., 496.

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proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.

APPEAL from a decree (6th January, 1882) of the High Court affirming a decree (18th June, 1880) of the Subordinate Judge of Jaunpur. The question now arising was as to the right construction of the words in an instrument which, although all its dispositions were not altogether testamentary, was termed a will throughout the case.

On its construction depended the question whether or not the plaintiff had rightly obtained a decree in her suit for possession of her share under the instrument, which was executed under the following circumstances:—Muhammad Imam Bakhsh, a Sunni Muhammadan of Jaunpur, being about to go on a pilgrimage to Mecca, where he afterwards went, and where he died, executed the instrument, "by way of a will," as he stated in it, on the 19th August, 1860, and caused it to be registered. He died about a year afterwards. His family then consisted of one surviving wife, Hingan Bibi, and her daughter, the respondent, Fatima Bibi; also of a grandson and grand-daughter, both minors, and of Muhammad Haidar Husain, his son by a wife who died before him, this son being the father of Muhammad Abdul Majid, the present appellant.

By the first clause in his will, as it was called, Imam Bakhsh, after stating who were his legal heirs as well as who were the other members of his family, dedicated a fourth part of his property, excluding certain immoveables, to the maintenance of a college and a mosque, and to other similar objects. The remaining three-fourths of his estate, as also all the immoveables excluded from the above dedication, he directed to be divided into four shares, or "sehams;" and of these he gave two to the respondent, Fatima Bibi, and of the other two shares he gave one to his son Muhammad Haidar Husain, and one to his grandson and grand-daughter above mentioned.

The will then stated the assent of Fatima Bibi and the other sharers to the dispositions made, and provided for the management of the four annas share directed as above mentioned, of which share it directed that the management should be retained by Muhammad Haidar Husain, and by some capable descendant

after him. Of all the testator's estate also the management was given to Haidar Husain, who, as to the lands, was to obtain *dakhil-kharij* in his name. This son was to continue in possession of the full sixteen annas of the estate, of which the management was to rest with him "always" and "for ever" (*hameshá wa dawámi ke liye*). There were also prohibitions of alienation to strangers.

The dispositions of the will were accepted by Hingan Bibi, by Muhammad Haidar Husain, and by the respondent; this assent being necessary on account of the testator's having made the shares materially different from those which the law would have given, which latter would have been one-eighth to the widow, with a division of the residue between the son and daughter, the former taking two-thirds and the latter one-third. Muhammad Haidar Husain entered upon the management and continued to pay their due proportion of the profits to the parties entitled until he died on the 20th July, 1875. On his death the present appellant, his eldest son, applied for mutation of names in the settlement record, the respondent filing her objections to the proposed entry, the dispute resulting in the present suit, which was brought on the 5th May, 1879.

The judgment of the Subordinate Judge of Jaunpur, Kashinath Biswas, was to the following effect:—He held that the important issue was whether the plaintiff was entitled to receive possession of the *corpus* of her share in the estate. The first question, therefore, was whether Haji Imam Bakhsh, the testator, intended to deprive the plaintiff or her children and heirs of possession of the share secured to her by the so-called will for all time to come, or only during the life time of Haidar Husain, the manager. Examining the clauses of the will, the Subordinate Judge held it to be clear that an absolute right of ownership was given to her. This had been qualified in favour of Haidar Husain during his life in virtue of the formal acceptance of the provisions of the will, he taking the right of management. The real question was whether that right was to go beyond the person and beyond the life of Haidar Husain or was limited to him for life.

The judgment continued thus:—"Throughout the clauses 5 and 6, in fact throughout the whole of the document, Haidar Husain

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in relation to the management of the estate, was mentioned in his individual person. Nowhere his heirs-at-law are mentioned as representing him, after his death, in the management of the estate, at least divided between the heirs of the testator or those whom he wished to benefit by his inheritance. At one place only, in clause 6, the words '*qáim maqám*' have been used as respects Haidar Husain, or where the testator says, that an auction-purchaser of the rights and interests of a sharer in the estate will not have the right of disturbing the possession and superintendence of Maulvi Muhammad Haidar Husain or of his '*qáim maqám.*' Here the words are clearly used in the sense of a personal representative, or as one standing in the place of Haidar Husain in his absence or by delegation. The will throughout is altogether silent as to the management, after the death of Haidar Husain, of by far the larger portion of the estate which was declared to belong to, and was divided into shares between, the legal heirs of the testator and the children of a deceased daughter. The omission or the silence on the point is the more striking when it is remembered that the testator specially provided, in clause 3, for the management, after the death of Haidar Husain, of the smaller portion of the estate which was assigned or set apart for charitable purposes. It is noticeable, besides, that in explaining, in clause 6, his object for the restriction as regards possession, the testator says: 'My, the declarant's, real object is, that all the properties belonging to me, the declarant, should, as specified above, remain for ever in possession of my children (*hamare aulád*).' This clearly shows that the testator did not mean that, after the death of Haidar Husain, his son or sons should take the management, to the exclusion of one begotten by the testator, as the plaintiff certainly is. But it is said that in giving the powers of management to Haidar Husain, the testator used the words '*hamesha wa dawámi ke liye*' ('for ever and in perpetuity'). The word '*hamesha*' may as well mean 'always,' and '*abad*' in Persian is another word for '*dawámi*,' both meaning 'for ever' or 'in perpetuity.' These words, when applied to a person individually, as they are certainly here used, mean no more than the lifetime of that person. In this sense the word '*abad*' is used in the Hedaya on the subject of usufructuary wills, in chapter VI,

of Baillie's Digest of Muhammadan Law, pp. 652-55 (1). The testator himself appears to have been fully aware of the real meaning of the words '*hamesha*,' '*dawámi*,' and *abad*, as in clause 6, in making it obligatory on his children (*aulád*) to give a right of pre-emption to co-sharers; he uses the words '*naslan bád naslan*' ('generation after generation') with the word '*dawámi*' ('in perpetuity'). Reading the whole of the will, it appears to me that Haidar Husain, because of the confidence his father had in him, and of the high ability he possessed, was appointed an executor in his own person, and such a power is not certainly inheritable by his son or heir-at-law in the absence of a provision to that effect in the will."

An appeal from the above was dismissed. The material part of the judgment of the High Court (STUART, C.J., and STRAIGHT, J.) was the following:

"The case for the appellant was ably and exhaustively argued by Mr. *Hill*; but it is unnecessary, in the view we take of the matter, to detail at length the points taken by him. It seems to us, that whether the instrument of the 19th of August, 1860 be considered as of a testamentary character in the nature of a will, or a deed of gift, or partly one and partly the other, is a mere question of terms, that is of no very great importance. The Subordinate Judge has regarded it in the light of a will, and under the circumstances in which he and we are called upon to consider it, the designation is perhaps not an unreasonable one. Be this as it may, it is certain that all the parties to whom it has reference, among them the father of the (defendant) appellant, and the (plaintiff) respondent, by the pen of her husband, gave their assent to its provisions by subscribing their names, and no point is raised upon either side as to the validity of the document itself, or the mode in which it was executed—the sole question in difference being the interpretation to which it is open. It is also obvious that, whether Haidar Husain was or was not legitimate, an issue, by the way, which I am glad to think it is unnecessary for us to decide, his father Imam Bakhsh had the very greatest confidence in him, and intended to hand over to him the entire administration of his affairs so long as he lived. To this

(1) Hamilton's Hedaya, Book LII, Chapter V; of usufructuary wills.

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arrangement the (plaintiff) respondent, having herself assented, was of course unable to raise any objection, nor indeed does it appear that she ever desired to do so; on the contrary, she recognized the powers of Haidar Husain, to the fullest extent, down to the time of his death in July, 1875, as is evidenced by the *ikrár náma* (agreement) of the 26th September, 1867. While it may well be that Imam Bakhsh, being bent upon a long and distant journey, from which he might naturally feel he was not likely to return, was desirous of making provision for the management of his estates, immediately upon his departure, as also for settling their distribution in the event of his death, it is far from probable that he ever intended to prevent his heirs for all time from acquiring the fee-simple of the properties, the rents and profits whereof they were to receive in stipulated proportions from Haidar Husain so long as he lived. Mr. *Hill* contended, that by the language of the document of the 19th of August, 1860, an estate in fee of the whole four sehams was conveyed to Haidar Husain, but we find nothing in any of its clauses, in our judgment, either directly or indirectly, to justify any such construction; on the contrary, we concur with the Subordinate Judge where he points out the obvious contrast between the language of clause 3 in contradistinction to that to be found in clauses 5 and 6. We know of nothing, either in Muhammadan or any other law, forbidding the creation of an interest of the kind now claimed by the (plaintiff) respondent, namely, limited during the existence of one life, and absolute on such life falling in. It certainly seems to us much more reasonable to infer that this was the intention of Imam Bakhsh, than to hold that he meant to perpetuate, for all time, to Haidar Husain and his heirs the possession and management of his estates, so as to exclude his other children or their issue from ever obtaining the *corpus* of the share allotted to them. Under any circumstances, the latter alternative should not, in our judgment, be adopted, unless the words of the instrument were so strong and clear as to leave no other construction possible. We do not feel called upon to discuss the case at any greater length, approving as we do generally of the remarks made by the Subordinate Judge and the conclusions arrived at by him. In our opinion, the plaintiff has made out her case to the two sehams claimed by her, and the appeal should be dismissed, with costs, in this and the lower

Court, the amount to be regulated according to the value of the relief decreed, less that refused".

On this appeal,

Messrs. *T. H. Cowie*, Q C, and Mr. *R. V. Doyne*, for the appellant, argued that on the due construction of the instrument of 19th August, 1860, the appellant, as representing his father, was, on the death of the latter, entitled to succeed to the office of manager of his grand-father's estate, subject to the right of the respondent to receive her share of the profits. The present suit tended directly to break up the estate of Muhammad Imam Bakhsh and to defeat the general intention of his so-called will. Sufficient effect had not been given to the intention apparent in the fifth clause, nor to the words in the clause relating to alienations to strangers, to the effect that the right of possession and management, given to Haidar Husain, was not to be disturbed, concluding, as they did, with the expression "or whoever may be his representative." These words indicated an intention on the part of the testator that his estate should at all times remain under the management of a representative of Haidar Husain. The respondent, while taking benefits under the will in excess of what she would have received by law as one of the heirs, ought not to be allowed to set aside the restriction subject to which her interest in the testator's property was conferred.

Mr. *Graham*, Q.C., and Mr. *J. D. Mayne*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal arises out of a disposition of his property made by one Imam Bakhsh. The disposition, which was not strictly a will, because it was made in his lifetime and he reserved to himself some benefit under it, was made on the 19th August, 1860, and he died about a year afterwards. At the time he made it the state of the family was this: He had two wives. By the first he had a daughter, Musammat Fatima Bibi, who had had a son, Hafiz Syed-ud-din, then dead. He had had another daughter, Musammat Makki Bibi, who had died, leaving two children, Muhammad Ibrahim and Mariam Bibi. By the second wife he had a son, Maulvi Muhammad Haidar Husain, who died in

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July, 1875, leaving his eldest son, the present appellant and the defendant in the suit, and other children. The contention between the appellant and respondent arose after his death. It was this, as stated in the plaint of the respondent which was filed on the 5th of May, 1879. In that she states the disposition of the property by her father, Imam Bakhsh, and that the management of the whole property was intrusted to Haidar Husain, and after the death of Imam Bakhsh, she, the plaintiff, confirmed him as manager, and that she has not disputed any of the rights of Haidar Husain. Then, after stating that he was in possession of the property and acted as manager, and stating his death, she says that, after his death, the defendant, without the consent and permission of the plaintiff, improperly took possession of the property constituting her share, and asked the Revenue Court to enter his name in the place of that of Haidar Husain, and that she gave notice to the Revenue Court of her dissent from that. She then goes on to say, "that the defendant, notwithstanding his want of right, not only arbitrarily declares himself to be the manager of the whole property, but considers and represents himself to be the permanent owner of the whole property, and by his own authority, and with the view of injuring the plaintiff, has committed and omitted to do acts calculated to cause great loss to her; and she prays that a decree may be passed in her favour declaring her right, permanent proprietary title and possession to her share in the property detailed below," and "that complete possession of her share may be awarded to her: that the defendant's possession and management may be removed."

The defendant, in his written statement, sets up this claim: "From the death of Maulvi Muhammad Haidar Husain the whole property mentioned in the will and the agreement legally devolved upon and came into the possession of the defendant under the express conditions and directions of the said documents, and with reference to inferences drawn from them. According to the terms of the will, the rules of the Muhammadan law, and the principles of justice, the defendant alone is entitled and competent to retain possession (subject to the conditions of the will), in order to carry out its provisions, which are to be carried out in perpetuity and for ever, and not for a limited period." It may here be noticed that the defendant is not the only heir of Muhammad Haidar

Husain, there are other persons who are also his heirs. The contention is that although the defendant is only one of the heirs, he alone is entitled and competent to retain possession.

This being the contention of the parties, the provisions in the document may now be looked at, to see how far the defendant's contention is supported by its provisions, and how far the right of the plaintiff to recover in this suit is established. Imam Bakhsh begins by saying: "I had two wives married according to the Muhammadan law: one, Musammat Hingan Bibi, who is at present alive, and by whom I had two daughters, one, Musammat Fatima Bibi, who is alive, and her son, Hafiz Syed-ud-din Muhammad Syed Bakht, now deceased, was adopted by me as my son, and the other, Musammat Makki Bibi, who died, leaving one son, Muhammad Ibrahim, and a daughter, Mariam Bibi, minors. My second married wife died, and Maulvi Muhammad Haidar Husain, a son by her, is alive. Therefore, according to the Muhammadan law, Musammat Fatima Bibi, my daughter, and Maulvi Muhammad Haidar Husain, the children of my loins, are my legal heirs." He then goes on to provide that the whole income of a four annas share of his villages and estates shall be devoted to charity and works of beneficence, and the remaining twelve annas of the villages and estates and the whole of his other property shall be divided into four 'sehams' (shares), and gives one share to Hafiz Syed-ud-din Muhammad Syed Bakht, one to Fatima Bibi, one to Maulvi Muhammad Haidar Husain, and one to Muhammad Ibrahim and Mariam Bibi, and says:—"During my, the declarant's, lifetime they shall continue to receive the profits of those 'sehams' (shares): the one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht will be received by his mother, Fatima Bibi. She will be the owner of her own one 'seham' and of one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht, in all of two 'sehams.' She is at liberty to give them to anyone she may like among her own children. It will be necessary and incumbent on all the said heirs to perform all the necessary and obligatory terms of this document, which they have of their own will consented to observe, and they will not have the power to dissent from it on any plea of law or Muhammadan law." The assent which is here stated is shown by their putting their names

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to the document after the signature of Imam Bakhsh. Then in the third clause he provides for what is to be done with the four annas share which was devoted to charity. He says :—"He, Maulvi Muhammad Haidar Husain, shall always be the manager of this four anna share; none of the heirs shall have the right to interfere in any way in the aforesaid four anna share. It shall be incumbent on Maulvi Muhammad Haidar Husain to keep the entire management in his own hands." A little lower down he says, "after Maulvi Muhammad Haidar Husain, whoever from the descendants is just, virtuous, and capable of performing this duty shall be the superintendent and manager of that four anna share. In short my, the declarant's, object is this—that the managership and superintendentship should always continue with Maulvi Muhammad Haidar Husain, and after him, as specified above, whoever among the descendants is capable of performing this work." The word "descendants" there means among his own descendants—not limited to the descendants of Muhammad Haidar Husain; and as far as this provision goes it would seem to point to some selection being made from amongst his descendants in order to have a person who should have the management of the charity property. Then we come, under the fifth clause, to the provision which he makes with regard to the remainder of his property. In the fourth clause he had said what there seems to be no doubt was his wish:—"The aforesaid heirs should continue in harmony and eat and reside together, so that being united, the estate may continue to improve and the name always be preserved." In the fifth he says: "Maulvi Muhammad Haidar Husain shall continue in possession and occupancy of the full sixteen annas of all the estates, villages, lands lying at different places, and moveable and immoveable property (collections from the villages). All the matters of management in connection with this estate should necessarily and obligatorily rest always and for ever in the hands of Maulvi Muhammad Haidar Husain." Here we have the words "always and for ever." But these words, according to several decisions of this Board, do not *per se* extend the interest beyond the life of the person who is named. *Per se* they are satisfied by limiting the interest which is there given to the life of Muhammad Haidar Husain. The Subordinate Judge has made observations upon the meaning of these words which are quite supported by the authorities. So far, then, there is nothing

in the words used by the testator to indicate an intention that the possession and management were to go to any one of his descendants after the death of Muhammad Haidar Husain. He then gives directions as to the recording of the name and goes on to say:—"No heir and no stranger shall at any time or period have, on any ground, or in any way, power to object to or oppose any of the matters above mentioned, or to take possession or to make any arrangements of his own regarding the estates. In all these matters all persons shall be entirely powerless;" showing there an intention to keep the property in the hands of his family if possible, and that no strangers should at any time come in and have any part of it. This is still further shown by the sixth paragraph. But before that he directs that Haidar Husain is to make collections of the profits, and says that he is to pay the profits of two out of the four shares to Fatima Bibi, "and the profits of one 'seham' he may take himself, and the profit of one share, that of Muhammad Ibrahim and Mariam Bibi, after deducting the expenses, he is to keep in deposit with himself," according to the provisions of a subsequent clause. This part clearly shows that what he intended was that during the life of Haidar Husain he was to give to the parties their shares of the profits. But there is no direction that this should be done by any other person after the death of Haidar Husain. The direction is applicable to Haidar Husain only, who is directed himself to pay the profits. Then he says:—"My, the declarant's, real object is that all my estates may always remain in possession of my descendants as specified above"—repeating the intention previously shown—"and no interference of any stranger on any account may be permitted therein, and my property should not be allowed to pass into the hands of any stranger. Hence I enjoin on Musammat Fatima Bibi, Maulvi Muhammad Haidar Husain, Muhammad Ibrahim, Mariam Bibi, and also their descendants, generation after generation in perpetuity, that when any of them is disposed to transfer his share by sale, mortgage, or lease, &c., then he must first offer to transfer to all of his sharers in property; and so long as the sharers are willing to take it, he must by no means transfer to others." There, it may be observed, he does not speak of profits. He had spoken previously of the shares and profits; but here he seems to be speaking of shares in the property, and the shares of the different persons,

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amongst others of Fatima Bibi, and he directs that they shall not transfer their shares of the property to strangers. Certainly that does not indicate an intention that the property should not be vested after the death of Haidar Husain in the persons to whom he had given the shares. Then he says :—"The stranger will not have any power to take any possession or occupancy of the transferred property beyond receiving the profits which will be handed to him ;" and "the purchaser also, beyond receiving the profits, shall have no power or right of possession or occupancy over the property sold ; nor by the auction shall the right of possession and management be disturbed of Maulvi Muhammad Haidar Husain, or whoever may be his representative." Mr. *Cowie* rightly admitted that by "representative" here is meant, not a successor of Haidar Husain in the right of Haidar Husain in any way, but a person who might, during Haidar Husain's life, be his agent ; thus again indicating that he was making a provision rather for what was to be done during the life of Haidar Husain than for what was to be done afterwards.

These are the provisions of the will, and it is difficult to see in them any provision by the settlor which would confer upon the present defendant the right which he now claims to have. There is nothing to show that the heirs of Haidar Husain were to take his place in the succession and management, and, even if there were, there would be this difficulty, that, if it went by right of succession to the heirs of Haidar Husain, they would all, and not the present defendant alone, come in. Thus expressions clearly denoting that the management is to be in a single hand would, by a strained application of them to a period beyond the life of Haidar Husain, be used to vest the management in a number of hands.

It has been contended by Mr. *Doyne* that there ought to be, and that there might be, a selection, by some sort of family council, of one of the heirs of Haidar Husain, who should succeed him in the management, and, in default of any appointment by a kind of family council, that it might be made by the Court. We find in this document no provision of the kind, nothing to indicate that it was the intention of the settlor that there should be any selection ; and it seems to their Lordships, whatever might

have been the wish of the settlor to keep the property in the family, impossible to say that he has so framed this instrument as to carry out such an intention or to effectuate such a wish beyond the life of Haidar Husain. The right of Fatima Bibi to her shares in the property is clear upon the terms of this instrument, unless the defendant could show that there were provisions in it which would control that part of it, and limit her for ever (for that seems to be the contention) simply to an enjoyment of the profits, and not to have any other interest in the property. There are words which indicate an intention that she should take an interest in the property with an attempt, no doubt, to control her in the disposition of it, and to prevent her parting with it to strangers.

It is unnecessary to allude to what is said in the judgments of the subordinate Court and the High Court. Their Lordships are of opinion that the conclusion they came to was a correct conclusion, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The costs of it will be paid by the appellant.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Barrow* and *Rogers.*

CRIMINAL REVISIONAL.

1885
December 7.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* BANDHU.

Animal "nullius proprietas"—Bull set at large in accordance with Hindu religious usage—Appropriation of bull—Act XLV of 1860 (*Penal Code*), *ss.* 403, 410, 411.

A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies.

Held that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore *nullius proprietas*, and incapable of larceny being committed in respect of it; and that the conviction must be set aside.

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QUEEN-EMPRESS v. BANDHU.

THIS was a case reported for orders, under s. 438 of the Criminal Procedure Code, by Mr. C. Donovan, Sessions Judge of Benares. One Bandhu was, on the 21st September 1885, convicted by Raja Jai Kishen Das, C.S.I., a Magistrate of the first class, under s. 411 of the Indian Penal Code, for dishonestly receiving a bull, knowing the same to have been criminally misappropriated, and sentenced to six months' rigorous imprisonment. The evidence showed that about midnight, on the 1st September, the accused was found going along a road in Mauza Sheonathpur, driving a bull before him. Upon being questioned by a chaukidár, he said he was an Ahír, but immediately corrected himself, saying :—"I am a Chamar and live at Ramnagar, and the bull belongs to the Maharaja. I am taking it to Ramnagar." He also stated :—"My house is at Goghra. The bull has been sent for by Madar and Samer, butchers. They have promised to pay me eight annas." The accused was then taken into custody. The bull was found to be blind, and to bear a brand indicating that it had been set at large by some Hindu at the time of performing funeral ceremonies in accordance with Hindu religious usage. Before the Magistrate the accused stated :—"I do not know who is the owner of this bull. Madar and Samer brought it from some place and gave it to me. I do not know where they drove it. The said two persons told me to take the bull secretly to their house, and promised to pay me eight annas. It was given to me at Goghra, on the western road leading to Chigya ; they made me stay near Bari Bagh from now till evening, and then told me to drive it. I acknowledge my fault that I took the stolen property with me at their instigation. Being hungry, I was tempted by the offer of eight annas."

The Magistrate, in convicting the accused, observed :—"Although no one has been found to be the owner, custodian, or keeper of this bull, yet it may be gathered from the statement of the accused himself that the butchers had come by it by illegal means. The bull is not stolen property, but there is no doubt that it was brought by means of misappropriation, and that the accused knowingly retained it for taking it away. Hence the accused is guilty under s. 411, according to the definition given in s. 410 of the Penal Code."

The accused appealed to the Sessions Judge, who, in dismissing the appeal, made the following observations :—"It was certainly not the intention of the persons who set the bull at large that any human right of property should be attached to it by any one, and the intentions of such persons are respected by general public feeling; and the bulls so let loose are looked upon as not liable to be converted to use in any way that would interfere with their liberty. I may be straining a point, but I think it may be held that the Hindu public have such an interest in these '*Sánds*' remaining unmolested and at liberty, as to make them the subject of a sort of public right, and so bring them within the meaning of 'property.' I find that the bull was, for the purposes of s. 403, 'property,' and that it was dishonestly misappropriated, and had therefore become stolen property (s. 410, Penal Code); and I affirm the conviction and sentence of the lower Court dismissing this appeal. As the question I have discussed, and upon which the case turns, is novel, but nevertheless may turn up again, and as my finding that the bull was 'property' was not arrived at without some hesitation, I think it well to submit the proceedings for the information of the High Court."

Munshi *Kashi Prasad* appeared for the prisoner, Bandhu.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STRAIGHT, J.—I am much indebted to Munshi *Kashi Prasad* for taking so much pains to put the case for the accused man before the Court. I entirely agree with what fell from the *Junior Government Pleader*, that an animal of the kind to which this case has reference was not "property" at the time of the alleged misappropriation, within the meaning of the Indian Penal Code, for it was not only not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose. It was therefore "*nullius proprietas*," and as incapable of larceny being committed in respect of it as if it had been "*feræ naturæ*." I am not now concerned to determine whether cases may not occur in which the killing of such an animal would be an offence; but I have simply to decide whether the conviction of Bandhu, under s. 411, can be upheld. I do not think that it can be; and, setting

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aside the orders of the Magistrate and the District Judge, he will stand acquitted. If he has not found bail and is in custody he will be at once released; if he has, no further order will be necessary.

Conviction set aside.

APPELLATE CIVIL.

1885 *December 7*

Before Mr. Justice Straight and Mr. Justice Tyrrell

UDIT SINGH (PLAINTIFF) *v.* PADARATH SINGH AND ANOTHER (DEFENDANTS).*

Pre-emption—Mortgage by conditional sale—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 120—*Time from which period of limitation begins to run.*

A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December, 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April, 1881.

In a suit for pre-emption in respect of the mortgage,—*held*, with reference to art 120, sch. ii of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April, 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal* v. *Gajraj Singh* (1) and *Prag Chaubey* v. *Bhajan Chaudhri* (2) referred to.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale, dated the 23rd March, 1868, made by the defendant Chatarpal Singh to the defendant Padarath Singh. The mortgagee had applied under Regulation XVII of 1806 for foreclosure of the mortgage, on the 21st April, 1873, and the year of grace allowed by that Regulation had expired on the 24th May, 1874, and a proceeding by the District Court foreclosing the mortgage had been drawn up on the 8th December, 1875. He had subsequently sued to have the conditional sale declared absolute and for possession of the mortgaged property, and had obtained a decree on the 28th April, 1881, for the relief claimed. On the 30th November, 1883, he had obtained possession of the mortgaged property in execution of that decree. This suit was instituted on the 27th March, 1884.

* Second Appeal No. 112 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 31st July, 1884, affirming a decree of Munshi Shiva Sahai, Munsif of Basti, dated the 5th May, 1884.

(1) I. L. R., 4 All. 414. (2) I. L. R., 4 All. 291.

The defendant Padarath Singh, the mortgagee, set up as a defence that the suit was barred by limitation.

The Court of first instance (Munsif of Basti) held that the suit was barred by No. 120, sch. ii of the Limitation Act, computing the period of limitation from the 8th December, 1875. It observed as follows: "It has been ruled in the following decisions that in cases of conditional sales the term of limitation for a pre-emptive suit should be calculated from the date of foreclosure—*Nath Prasad* v. *Ram Paltan Ram* (1) and *Ashik Ali* v. *Mathura Kandu* (2). The case last cited is similar to the present. I therefore, without disposing of the other issues, dismiss the plaintiff's claim with costs."

On appeal the lower appellate Court (Subordinate Judge of Gorakhpur) concurred with the Munsif that the suit was barred by limitation under art. 120, but computed the period of limitation from the 24th May, 1874, the date of the expiration of the year of grace.

The plaintiff appealed to the High Court, contending that the period of limitation should be computed from the date the mortgagee had obtained possession in execution of his decree.

Lala *Lulta Prasad*, for the appellant.

Mr. *Carapiet*, for the respondent.

STRAIGHT, J.—The article of the Limitation Law admittedly applicable to this case is art. 120, and the only question is, from what point are the six years to be held to commence. Now, although the final order for the foreclosure was made in December, 1875, Padarath Singh, the vendee, was compelled to bring a suit for declaration of his title and possession, and it was not until the 28th April, 1881, that he obtained a decree, under which possession was subsequently given him on the 30th November, 1883. For the reasons given by me in *Rasik Lal* v. *Gajraj Singh* (3), I think that the pre-emptor is entitled to contend that his full right to impeach the sale had not accrued until the validity of the sale, as between the vendor and vendee, had been established by a Court, for *non constat*, but that it might have been found invalid, in which

(1) I. L. R., 4 All. 218. (2) I. L. R., 5 All. 187.
(3) I. L., R., 4 All. 414.

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case his cause of action would have disappeared. It is not necessary for me to discuss here whether I am prepared to adopt the view expressed by my brothers Oldfield and Brodhurst in the case of *Prag Chaubey* v. *Bhajan Chaudhri* (1); as taking the decree of the 28th April, 1881, as the starting-point, the present suit, which was started on the 27th March, 1884, is abundantly within time. In my opinion this appeal must be decreed, and the decrees of the lower Courts being reversed on the preliminary point on which they threw out the suit, the case will be remanded to the Munsif, under s. 562 of the Civil Procedure Code, for disposal on the merits. The costs hitherto incurred will be costs in the cause.

TYRRELL, J.—I agree in the views stated and the order made by my learned brother.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885 *December 7.*

THAKUR DAS (DECREE-HOLDER) *v.* SHADI LAL (JUDGMENT-DEBTOR)*

Execution of decree—Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *Nos.* 178, 179.

A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond, contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February, 1885, the decree-holder applied for execution of the decree.

Held that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the Limitation Act, and not of art. 179, should be applied to the case, and the application for execution having been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation.

THE decree of which execution was sought in this case, bearing date the 8th December, 1881, was made in a suit on a simple mortgage-bond. It contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by sale of the mortgaged property." The decree-holder applied for execution of the decree on the 17th February, 1885. The Court of first instance (Munsif

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* Second Appeal No 72 of 1885, from an order of C J. Daniell, Esq, District Judge of Farukhabad, dated the 23rd June, 1885, affirming an order of Sayyid Zakir Husain, Munsif of Farukhabad, dated the 9th March, 1885.

(1) I. L. R, 4 All. 291.

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of Farukhabad) rejected the application on the ground that it was barred by limitation. The Court was of opinion that the decree-holder should have applied for execution within three years from the date of the decree, as provided by art. 179, sch. ii of the Limitation Act, inasmuch as the decree could have been executed against the judgment-debtor personally from its date, although it could not have been executed against the mortgaged property till the expiration of four months from its date, and no such application having been made, the present application was barred.

On appeal by the decree-holder the lower appellate Court (District Judge of Farukhabad) affirmed the order of the Court of first instance.

The decree-holder appealed to the High Court, contending that the application was not barred by limitation.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

BRODHURST and TYRRELL, JJ.—The Courts below were wrong in applying the provisions of art 179, sch. ii of the Limitation Act to this case. The decree made on the 8th December, 1881 provided expressly that the decree-holder might not apply for its execution till after expiry of four months from that date, that is to say, till after the 8th of April, 1882. Therefore the limitation of art. 178 applies to the case before us. The decree-holder has three years from the date when the right to ask for execution accrued to him. His application of the 17th February, 1885, being within three years from the 8th April, 1882, is not barred. The appeal is decreed with costs.

Appeal allowed.

1885 December 11.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

TAHAL (PLAINTIFF) *v.* BISHESHAR AND ANOTHER (DEFENDANTS) *

Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings—Act I of 1877 (Specific Relief Act), s 21.

One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of

* Second Appeal No. 149 of 1885, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 9th January, 1885, reversing a decree of Shaikh Maula Bakhsh, Munsif of Mirzapur, dated the 23rd August, 1884.

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s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

Held that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act.

The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

THE plaintiff in this suit claimed possession of a house. He alleged that many years ago he and his brother, the father of the first defendant, Bisheshar, and grand-father of the second defendant, Khannu, had made a division of their ancestral property; that the house in question, which was a part of such property, fell to the plaintiff's share; and that he had been wrongfully dispossessed of it by the defendants. The defendants pleaded—(i) that there had been an agreement between the plaintiff and themselves to refer the matter to arbitration, and that the suit was barred by the last paragraph of s. 21 of the Specific Relief Act; and (ii) that there had been no such division of property as alleged by the plaintiff; and that, assuming that such division had been made, the plaintiff was entitled to one-half of the house only.

Upon the first of these contentions, the Court of first instance (Munsif of Mirzapur) observed as follows:—"I have very carefully considered the objection founded on the concluding paragraph of s. 21 of the Specific Relief Act, and the conclusion to which I have come is adverse to the defendants. To succeed in that plea, the defendant must, in my opinion, prove that the plaintiff has refused to perform the contract to refer to arbitration. This has not been done—not even alleged nor suggested—by the defendants: on the contrary, one of their witnesses, Debi Prasad, gives as a reason why there was no award, that which I think to be equally the fault of the defendants. He says:—'No award has been delivered; since the agreement the parties have quarrelled, and the present suit has been instituted; therefore no award was made.' I understand him to mean that neither party abided by the contract, and therefore there was no award. This appears to me to be the law itself. As an authority, if needed, I refer to *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). The plaintiff's own

(1) I. L. R., 5 Calc. 498.

explanation why he would not conform to the aforesaid agreement is, that the arbitrators had refused to decide, and that some of them have died since the institution of the suit. The first portion of this statement is disputed, as the pleader for the defendants contends that the arbitrators did not refuse; but whether they did or did not refuse is, I think, immaterial, since it is now admitted that some of them are dead; and, this being so, I hold that the agreement has ceased to be operative between the parties (*Russell On Arbitration*, p. 156). It has been also urged that as the arbitrators, who are stated to be now dead, were alive, and all were willing to adjudicate, at the time the suit was brought, the question of the liability of the plaintiff under the agreement should be determined as it then stood: that, looking at it in that aspect, I should hold the present suit to be barred by s. 21 of the Specific Relief Act, and relegate the plaintiff to a fresh suit. This seems to me a too inequitable view of the matter, and I cannot adopt it. I therefore hold that nothing has been shown to bar the present suit." On the merits of the suit the Court found that there had been a division of the ancestral estate, and that the house in question had fallen to the plaintiff's share, and had been held by him for forty years. The Court accordingly decreed the suit.

The defendants appealed to the District Judge of Mirzapur. Upon the question whether the suit was barred by s. 21 of the Specific Relief Act, the Judge observed:—"The Munsif seems to have drawn the conclusion that both parties agreed to revoke the reference to arbitration; for he says, 'I understand him (Debi Prasad) to mean that neither party abided by the contract, and therefore there was no award.' But I do not think that more can be deduced from the witness's words than that the parties quarrelled in the course of the arbitration, and thereupon the plaintiff rushed into court. Now this, I think, amounted to a refusal to perform his share of the contract. He had contracted to await and abide by the award of the arbitrators. Instead of doing this, he rushed into court before the arbitrators had had time to complete the inquiry upon which they had entered. This case, then, is clearly distinguishable from *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1), cited by the Munsif, where the reference to arbitration had been

(1) I. L. R., 5 Calc. 498.

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contingent, but when the contingency arose, the defendants omitted to call upon the plaintiff to carry out his contract to refer the dispute to arbitration, and, in consequence of this omission and of the plaintiff's omission to bring the case before the arbitrator, the case never came before the arbitrator at all. That precedent merely shows that from the mere omission of the plaintiff to bring the case before the arbitrator, it cannot be inferred that he has refused to allow it to go before the arbitrator, and the same rule is laid down in *Atma Rai* v. *Sheobaran Rai* (1). But here the case was actually before the arbitrators, and the plaintiff tried to withdraw it from their cognizance by filing this suit. Under these circumstances, I think the suit is barred. The cause of action is said to have accrued on the 17th January, 1882, and the house in suit was admittedly one of the two houses specified in the agreement of the 18th May, 1883; and it is clear, therefore, that the subject of the present suit is one of the subjects that the plaintiff had contracted to refer. The Munsif assigns another reason for holding that the suit is not barred, namely, that some of the arbitrators being admittedly now dead, the agreement had ceased to be operative. But I think that 'the existence of such contract' in s. 21, means 'the existence of such contract at the time of institution of the suit,' as clearly appears from the context. Whether or not the plaintiff may be entitled to institute a suit after the death of some or all of the persons named as arbitrators, he was not entitled to institute the present suit at a time when all those persons were alive. I reverse the Munsif's decree, and dismiss the suit with costs in both Courts."

The plaintiff appealed to the High Court, contending that the suit was not barred by s. 21 of the Specific Relief Act.

Munshi *Kashi Prasad*, for the appellant.

Babu *Ram Das Chakarbati*, for the respondents.

BRODHURST and TYRRELL, JJ.—It is admitted in this case that the parties agreed to an arbitration on the 18th May, 1883. One of them has brought this suit for part of the subject-matter referred to the arbitrators more than a year after that date. The defendants plead the bar of s. 21 of the Specific Relief Act, but they do not allege in their answer to the plaint that the plaintiff

(1) Weekly Notes, 1882, p. 58.

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refused to perform his contract to submit to arbitration. And one of the arbitrators, a witness in this case, has sworn that the arbitrators did not decide the case because "the parties were contentious among themselves." The Judge, in appeal, held that the mere act of filing this suit on the part of the plaintiff is tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. We cannot take this view; and we hold that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it. We allow the appeal, and setting aside the decree of the lower appellate Court, remit the appeal for determination on the merits, under s. 562 of the Civil Procedure Code. Costs will be costs in the cause.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885
December 12.

DHANAK SINGH AND OTHERS (DEFENDANTS) *v.* CHAIN SUKH (PLAINTIFF).*

Lambardar and co-sharer—Suit by co-sharer for profits—Burden of proof—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 209.

When a co-sharer claims a dividend on the full rental of the mahál, and the lambardár pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár, in the sense of s. 209 of the N.-W. P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections.

THE plaintiff in this suit, a recorded co-sharer in a mahál, sued the defendant, the lambardár, for his share of the profits, claiming in respect of the full rental of the mahál. The Assistant Collector trying the suit gave the plaintiff a decree for profits calculated on what the defendant and the patwári said had been collected, on the ground that it was for the plaintiff to prove that more was collected, or that the defendant was able to collect more, which he had not done. On appeal to the District Court the plaintiff contended that he was entitled to a share of profits calculated on the full rental of the mahál, and that if the lambardár asserted that he had collected less than the full rental, the burden of proving that fact rested

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* Second Appeal No. 160 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 12th November, 1884 modifying a decree of Pandit Maháraj Narain, Assistant Collector of the first class, Farukhabad, dated the 29th March, 1884.

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on him, and also of showing that he was unable to collect the full rental owing to circumstances which would relieve him of the responsibility of accounting to the shareholders for the full rental. The District Judge allowed this contention; and, as the defendant had not proved that he had not collected the full rental, and had not shown that he was unavoidably prevented from collecting, he gave the plaintiff a decree for the amount he claimed.

The heirs of the lambardár appealed to the High Court.

Mr. *Carapiet*, for the appellants.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

BRODHURST and TYRRELL, JJ.—The burden of proof has been wrongly laid by the appellate Court on the lambardár in this case. When a co-sharer claims a dividend on the full rental, and the lambardár pleads in reply that the actual collection fell short of that rental, it is incumbent on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár in the sense of s. 209 of the Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. The Court below has ruled erroneously to the contrary effect; and we must modify his decree to this extent.

The appeal is allowed, with costs in proportion to the amount by which the decree will be thus reduced.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr Justice Oldfield.

1885 *December* 12.

CHHIDDU (DEFENDANT) v. NARPAT AND OTHERS (PLAINTIFFS).*

Jurisdiction—Civil and Revenue Courts—Suit by lessee of occupancy-tenant for recovery of possession—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 95 (*n*).

S. 95 (*n*) of the N.-W. P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by the Revenue Courts. *Muhammad Zaki* v. *Hasrat Khan* (1) and *Ribban* v. *Partab Singh* (2) distinguished.

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* Second Appeal No 189 of 1885, from a decree of Maulvi Muhammad Abdul Basit, Subordinate Judge of Mainpuri, dated the 17th September, 1884, reversing a decree of Maulvi Sakhawat Ali, Munsif of Etah, dated the 27th June, 1884.

(1) Weekly Notes, 1882, p. 61. (2) I. L. R., 6 All., 81.

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THE plaintiffs in this suit, claiming to be the sub-tenants of the defendant, a tenant with a right of occupancy, under a lease in writing, and alleging that the defendant had illegally ejected them, sued for possession of the land leased to them. The suit was instituted in the Court of the Munsif of Etah. The defendants set up as a defence to the suit, amongst other things, that the suit was one cognizable in the Revenue and not in the Civil Courts. Upon the issue framed on this contention the Munsif held, that, the dispute being between two cultivators, the suit was cognizable in the Civil Courts, and, deciding the other issues in favour of the defendant, dismissed the suit. On appeal by the plaintiffs, the lower appellate Court (Subordinate Judge of Mainpuri) gave them a decree, holding also, for the same reason as the Munsif, that the suit was one of which the Civil Courts could take cognizance.

The defendant appealed to the High Court.

Mr. *Simeon*, for the appellant.

Babu *Ram Das Chakarbati*, for the respondents.

OLDFIELD, J.—In this case it is admitted that the defendant has the rights of an occupancy cultivator in this land, and the plaintiff is a lessee from him. The suit is a suit to recover possession of the land under the lease from which the defendant has ejected the plaintiff. The only question before us is, whether the Civil Court has jurisdiction to entertain this suit. In my opinion the finding of the lower Court on this question is wrong. The suit is exclusively cognizable by the Revenue Courts. The lower Court is wrong in holding that when both the parties are cultivators the suit is cognizable by the Civil Courts, because there is no relation in that case of landholder and tenant as contemplated by the Rent Act. This is not so; the matter in suit is a matter on which an application of the nature mentioned in s. 95 (*n*)—"application for recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed"—might be made. The rulings cited by the learned pleader for the respondent—*Muhammad Zaki* v. *Hasrat Khan* (1) and *Ribban* v. *Partab Singh* (2)—are distinguishable. In those cases the suit was brought against the

(1) Weekly Notes, 1882, p. 61. (2) I. L. R., 6 All., 81.

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defendant as a trespasser for a declaration of right. The decree of the Court below is reversed, and the suit is dismissed with costs in all Courts.

PETHERAM, C. J.—I concur.

Appeal allowed.

1885 *December* 14.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

MUHAMMAD ABID AND ANOTHER (PLAINTIFFS), *v.* MUHAMMAD ASGHAR (DEFENDANT).*

Arbitration—Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 508, 509, 511, 523—*Application to set aside award—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 158.

In an agreement to refer certain matters to arbitration, which was filed in court under s 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

Held that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated. *Lachman Das* v. *Brijpal* (1) referred to.

Held that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

Held that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

Held also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure

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* Second Appeal No. 191 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 21st November, 1884, reversing a decree of Maulvi Nasr-ul-la Khan, Subordinate Judge of Jaunpur, dated the 31st March, 1884.

(1) I. L. R., 6 All., 174.

Code, *i. e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

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MUHAMMAD ABID v. MUHAMMAD ASGHAR.

THE facts of this case are stated in the judgment of the Court.

Mr. *C. H. Hill* and Shah *Asad Ali*, for the appellants.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the respondent.

PETHERAM, C J., and OLDFIELD, J.—This is a case coming under s. 523 of the Civil Procedure Code.

The plaintiff applied in writing to the Court of the Judge of Jaunpur to file an agreement entered into by him and the defendant to refer certain matters to arbitration. The agreement is dated the 27th August, 1879, and the application was presented on the 17th August, 1883.

This application was numbered and registered as a suit, as required by the section ; and notice was given to the parties to show cause why the agreement should not be filed. The defendant filed some objections, which were disallowed ; and the Court made an order of reference, as required by the section, to the two arbitrators named in the agreement.

By this agreement only two arbitrators were named, and no provision was made for difference of opinion, by appointing an umpire, or otherwise. It appears that one of the arbitrators applied to the Court to appoint an umpire, as the arbitrators could not agree ; and the Court did appoint an umpire, and directed that the award should be submitted on the 17th March, 1884.

The defendant, on the 14th March, 1884, objected to the umpire appointed by the Court ; and no notice would appear to have been taken of the objection ; and an award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court on the 15th March, 1884.

Some objections were filed to it by the defendant, on the 27th March, which were disallowed ; and the Court passed a decree in conformity with the award. The defendant then appealed to the Judge, who reversed the decree, on the ground that the award was illegal, inasmuch as it was not consistent with the agreement for the Court to appoint an umpire, or for the award to be made by the umpire and one only of the arbitrators named.

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In appeal by the plaintiff, it has been urged that no appeal lay to the Judge, and that the defendant was precluded from appealing, inasmuch as he had not applied to set aside the award within the ten days allowed by art. 158 of the Limitation Act, and that it was within the power of the Court to appoint an umpire, and for the umpire and one arbitrator to make the award.

We think the appeal must fail. An appeal will lie to the Judge from the decree of the first Court with reference to the Full Bench ruling of this Court to which the Judge refers (1), where there has been no legal award such as the law contemplates; and this is the case here, as it seems to us that the agreement gave the Court no power to appoint an umpire, and required that the award should be made by the two arbitrators named by the parties.

It has been contended that s. 509 of the Civil Procedure Code gives the Court a power to provide in the way it did for difference of opinion among the arbitrators; and we were also referred to s. 508.

But s. 509 and the other sections preceding s. 523 are only made applicable to cases coming under s. 523 (like the one we are dealing with,) so far as their provisions are consistent with the agreement filed under s. 523.

The terms and intentions of the agreement itself must therefore be looked to, to see if s. 509 or s. 511 could be properly applied in this case; and we think they could not, as no implied power to appoint an umpire can be gathered from the agreement of the parties, which appears to have been that the two arbitrators named by them should alone and in consultation arbitrate between the parties, by coming to some unanimous decision upon the matters referred. There will be therefore no legal award in this case.

We do not think that there is any force in the plea that the defendant-respondent is precluded from contesting by way of appeal the decree of the first Court, because he did not apply to the Court to set aside the award within the time allowed by art. 158 of the Limitation Act.

This article applies to applications under the Civil Procedure Code to set aside an award, that is, to applications referred to

(1) *Lachman Das* v. *Brijpal*, I. L. R., 6 All. 174.

in s. 522, which are those to set aside an award on any of the grounds mentioned in s. 521.

The defendent, in appeal, however, does not contest the award on any of those grounds.

His objection is that the persons who made the award had no power at all to make it; and there was, in consequence, no legal award; and he questions the legality of the procedure. Whether or not the defendant would be precluded in appeal from making objections on any of the grounds mentioned in s. 521, because he had not applied to set aside the award on those grounds within the time allowed by the Limitation Act for making the application, is a question we need not determine, as it does not arise here; but there is nothing with reference to the Limitation Act to prevent him from raising the question he now does.

A long argument was addressed to us by Pandit *Ajudhia Nath* on behalf of the defendant, that the plaintiff-appellant's application to file the agreement was itself barred by limitation under art. 178 of the Limitation Act; but taking the view here taken, that the appeal fails, it is unnecessary to discuss it.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1885 *December* 14.

GOPAL DAI (PLAINTIFF) *v.* CHUNNI LAL (DEFENDANT)*

Execution of decree—Attachment of property—Payment into court of money due under decree—Civil Procedure Code, s. 295—Assets realized by sale or otherwise.

G and *C* held decrees against *B*, and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into court the sum of Rs 1, 200 on account of *G's* decree.

Held that *G* was entitled to the sum of Rs. 1,200 paid into court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.

Purshotamdass Tribhovandass v. *Mahanant Surajbharthi Haribharthi* (1) approved.

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* Second Appeal No 1663 of 1884, from a decree of Babu Pramoda Charan, Judge of the Small Cause Court, Agra, exercising the powers of a Subordinate Judge, dated the 26th August 1884, affirming a decree of Lala Baij Nath, Munsif of Agra, dated the 9th May, 1884.

(1) I. L. R., 6 Bom., 588.

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GOPAL DAI
v
CHUNNI LAL.

THE plaintiff in this suit, Gopal Dai, a Hindu widow, obtained a decree against her husband's father and brother for a maintenance allowance of Rs. 120 per mensem. In February, 1883, she applied for execution of this decree, praying to recover Rs. 1,200, arrears of the allowance, by the attachment and sale of a village belonging to the judgment-debtors. The village was attached, and then the judgment-debtors paid into court the amount of the arrears By the order of the Court executing the decree the amount was rateably divided between the plaintiff and other persons who held decrees against the plaintiff's judgment-debtors, and had applied for execution thereof. One of these decree-holders was the defendant in this suit, Chunni Lal, to whom Rs. 844-3-9 were paid. The plaintiff sued to recover this amount from him. Both the lower Courts held that the defendant was entitled to the amount under the provisions of s. 295 of the Civil Procedure Code.

In second appeal by the plaintiff it was contended on her behalf that the provisions of s. 295 were not applicable under the circumstances.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *W. M. Colvin*, for the respondent.

OLDFIELD and BRODHURST, JJ.—We are of opinion that s. 295 of the Civil Procedure Code does not apply to this case.

The plaintiff and defendant held decrees against Babu Bishambhar Nath, and took out execution of them, and the judgment-debtor's estate, mauza Barara, was attached, but no sale took place. The judgment-debtor paid into court the sum of Rs. 1,200 on account of the plaintiff's decree, and the question is whether the plaintiff is entitled to this sum, or it was rateably divisible among the decree-holders.

We think that this sum cannot be held to be assets realized by sale, or otherwise, in execution of a decree, so as to be rateably divisible under s. 295. It cannot be said that there was a realization from the property of the judgment-debtor, and so the payment does not come within the meaning of s 295. The payment would not release the property from attachment, or stop sale in execution of the defendant's decree.

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We concur in the view of the law taken by the Bombay High Court in *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi* (1), which supports the view we take here.

The plaintiff is therefore entitled to a decree, and we reverse the decree of the lower Court, and decree the claim with all costs.

Appeal allowed.

Before Mr. Justice Oldfield and Mr Justice Brodhurst.

1885 *December 15*

THE LAND MORTGAGE BANK OF INDIA (PLAINTIFF) *v.* MOTI AND OTHERS (DEFENDANTS) *

License, revocation of—Works of permanent character executed by licensee—Act V of 1882 (*Easements Act*), *ss* 60, 61.

In a suit by a zamíndár to have his right declared to build a house on some waste land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing floor and for stacking cow-dung.

Held that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff, and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.

THE facts of this case are stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The respondents were not represented.

OLDFIELD and BRODHURST, JJ.—The claim is by a zamíndár to have his right declared to build a house on some waste land in the mauza. Defendants are tenants in the mauza, and assert that they have built wells and water-courses on this land, and have a right also to use it as a threshing-floor and for stacking cow-dung. On these grounds they resist the claim.

The Court below admits that the defendants have no proprietary right in this land, but has dismissed the claim on the ground that they have acquired a right to use it for the purposes claimed.

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* Second Appeal No 61 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 10th December, 1884, modifying a decree of Maulvi Muhammad Anwar Husain, Munsif of Kaimganj, dated the 13th June, 1884.

(1) I. L. R., 6 Bom. 588.

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But if they have acquired no right adverse to the plaintiff as owners, by prescription, or otherwise, in the land, their right of use can only be as licensees of the plaintiff; and, on the facts found in this case, it can be revoked by the plaintiff, except in respect of the wells, which are works of a permanent character, and on which the defendants have incurred expenses.

The principle of ss. 60 and 61 of the Easements Act is quite applicable to this case, although that Act is not in force here.

In this case, their right to the wells which they have made cannot be interfered with; but the zamíndár can revoke the license as to the other use claimed of the land.

The decree of the Court of first instance, which, while decreeing the claim to build the house, preserves the rights as to the wells and taking water from them, and also provides, by consent of the plaintiff, facilities for a threshing-floor, &c., is fit to be affirmed.

We set aside the decree of the lower appellate Court, and restore that of the first Court with costs.

Appeal allowed.

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December 9.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

BHOLAI AND ANOTHER (PLAINTIFFS) *v.* KALI AND ANOTHER (DEFENDANTS)*

Hindu widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree—Act I of 1877 (*Specific Relief Act*), *s.* 42.

The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

Held that if the widow's possession were only a possession by the plaintiffs' consent entitling her merely to receive the profits for her maintenance, the plaintiffs

* First Appeal No. 18 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 3rd December, 1884.

might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

Held also that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

THE plaintiffs in this suit alleged in their plaint that they and one Doman Pandey were members of a joint and undivided Hindu family; that Doman Pandey died leaving him surviving a minor son called Nihor; his other son, Behari, having died during his father's lifetime leaving a widow, the defendant Musammat Kali; that Nihor died a few days after his father and before his name was entered in the revenue records in respect of the rights and interests of his father; and that, owing to the circumstances mentioned above, "the name of Musammat Kali, daughter-in-law of Doman Pandey, was caused to be entered in respect of the rights and interests of Doman Pandey, merely by way of consolation and courtesy to the said Musammat, who had in fact no right to the property in question, and her name had hitherto continued to be recorded." The plaintiffs then went on to allege that, "notwithstanding her want of right in every way," Musammat Kali had, on the 21st May, 1877, executed a bond for Rs. 778 in favour of the defendant Raghubans Pandey, in which she made a simple mortgage of a one anna and one pie share in mauza Sihonda, a part of the property recorded in her name; that Musammat Kali was not competent to make the mortgage, nor was there any necessity for the loan, nor was the bond in question in any way valid and enforceable as regards the plaintiffs, nor had Musammat Kali any right in the property "other than her possession as a trustee in lieu of her alimony;" that in addition to the bond mentioned above Musammat Kali had given another bond to Raghubans Pandey, on which the latter had, on the 6th February, 1884, obtained a decree, in execution of which he had caused a part of the property recorded in the name of Musammat Kali to be attached; and that the property was not liable for this debt and had

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been wrongfully attached, Musammat Kali having no right therein, and the debt not having been contracted for necessary purposes. On these allegations the plaintiffs claimed the following reliefs :—

"That by establishment of the plaintiffs' right and invalidation of the bond, dated the 21st May, 1877, and of the attachment proceedings, it may be declared that the under-mentioned property, recorded in the name of the female defendant, can in no way be liable for the amount due under the bond dated the 21st May, 1877, and for the amount of the decree dated the 6th February, 1884."

In the mortgage-bond, in respect of which relief was claimed, Musammat Kali, after stating that she had borrowed Rs. 778 from Raghubans Pandey at the rate of Re. 1-8-0 per cent. per mensem, and promising to repay that amount within one year, and after stating the purposes for which the money had been borrowed stated as follows :—"I hypothecate a one anna and one pie share of mauza Sihonda..... for this sum, and I will not mortgage or transfer it in any way until the said sum with interest is repaid."

The suit was defended by both defendants upon the ground, amongst others, that Doman Pandey had in his lifetime separated from the family to which he and the plaintiffs belonged ; that Behari, the deceased husband of Musammat Kali, had not predeceased his father Doman and his brother Nihor, but, on the contrary, Nihor had died first and then Doman, and Behari had succeeded to the property recorded in his father's name, and had in turn been succeeded by Musammat Kali as his heir; and that the debts which the lady had contracted she had power to contract, and the plaintiffs were not competent to maintain the suit, inasmuch as they were not the next reversioners, Behari's daughter and daughter's son being alive.

The defendants succeeded in this defence and their other defences in the Court of first instance (Subordinate Judge of Gorakhpur), which dismissed the suit. The plaintiffs appealed.

Messrs. *T. Conlan* and *G. T. Spankie*, for the appellants.

Mr. *C. H. Hill*, Babu *Jogindro Nath Chaudhri*, and Lala *Jokhu Lal*, for the respondents.

Mr. *G. T. Spankie*, for the appellants.—The evidence on the record shows that Behari, husband of the defendant Musammat Kali, predeceased his father Doman and his brother Nihor. The family was joint, and Kali enjoyed the profits of the estate, by permission of the plaintiffs, in lieu of her maintenance only, and not by reason of any interest possessed by her in the property. This being so, her possession was necessarily restricted to her own personal enjoyment, and could not be alienated by her. The mortgage executed by her in favour of the defendant No. 2 was therefore an illegal transaction, and the plaintiffs are entitled to a declaration to that effect.

[PETHERAM, C. J.—If the defendant's possession depends wholly on the plaintiffs' permission, she is their tenant-at-will, and they can eject her at any moment. In that case, however, they must seek their relief by ejectment, and cannot, with reference to the proviso to s. 42 of the Specific Relief Act, sue for a mere declaration of their title. The Legislature intended by that section that the Court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. Where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form of relief, the more direct kind not being open to him. A mere declaration was never granted except on this condition. On the other hand, if the plaintiffs in this case cannot eject the widow at their will, she has at all events a right to possession, and that is surely a transferable interest?]

What the plaintiffs desire is not the ejectment of the widow, but the invalidation of the mortgage of the estate by her. All that the proviso to s. 42 of the Specific Relief Act forbids is a suit for a pure declaration, without further relief: it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. The plaintiffs here ask for consequential relief, in addition to a declaration, for they seek to set aside the alienation and the attachment proceedings. Secondly, assuming that the plaintiffs

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cannot eject the widow, it does not follow that she has a transferable interest in the property. Her interest was by its very nature confined to her personal enjoyment, and incapable of transfer, resembling in this particular the interest of an occupancy-tenant under Act XII of 1881 (N.-W. P. Rent Act), whose alienations though invalid do not entitle the landlord to eject him from his holding. The analogy of English estates is misleading when applied to the possession and transfer of property under the Hindu law.

[PETHERAM, C. J.—You say that the family being joint, the widow of Behari took no interest in the estate, but a mere right of maintenance, but that, by a family arrangement, the reversioners allowed her a life estate in lieu of her maintenance. What evidence is there to show that this life estate was confined to her personal enjoyment, and that she was not competent to transfer it?]

That is the necessary legal consequence of the facts that the family was joint, and that the widow's possession was in lieu of maintenance. She was not in the position of the widow of a separated Hindu.—*Hurdyal Singh* v. *Shewdyal Singh* (1).

[OLDFIELD, J.—Surely the power of the widow to transfer an interest of this kind is a matter of evidence in each case.

PETHERAM, C. J.—If the widow had the limited interest you have described, nothing beyond that interest can be affected by her alienations. If the mortgage-deed does not specifically refer to the whole estate, it must be assumed to relate to such interest only as the mortgagor could legally deal with, and you cannot sue upon the assumption that she meant to deal with more. How then is the title of the reversioners endangered ?]

Such a transfer is injurious to the reversioners, because the transferee may be put in possession, and they may be compelled to sue him for ejectment, possibly long after the evidence regarding this transaction has ceased to exist. The bond purports, upon its face, to mortgage the whole one anna and one pie share : it contains nothing which confines its operation to the widow's interest, and

(1) N.-W. P. S. D. A. Rep., 1864, vol. ii, p. 104.

the *onus* of proving such restriction would lie upon any person asserting it.

[PETHERAM, C. J.—Ought not the plaintiffs to have objected in the execution proceedings to the attachment of the property in execution by the defendant Raghubans Pandey?]

They were not obliged to do so: s. 283 of the Civil Procedure Code does not establish any new form of suit. The form of suit is an old one, and the object of the section is to save it, and to prevent any possible impression that the order refusing to release the property from attachment is conclusive.

Mr. *C. H. Hill*, for the respondents, was not called on to reply.

PETHERAM, C. J.—I am of opinion that this suit is not maintainable. The facts, as alleged by the plaintiffs-appellants themselves, are, that the female defendant is the widow of a Hindu who was a member of an undivided Hindu family, and that they (the plaintiffs) represent the other members of that family. They allege that, after the death of their brother, they allowed the widow's name to be recorded in his place, in respect of his rights and interests in the property in dispute, out of compliment to her, and that subsequently, although she was not entitled to any interest in the property itself, but only to receive maintenance from them, she was allowed to receive the profits in lieu of the maintenance. They further state that, under this arrangement, she obtained and still continues in possession, and that she executed a deed mortgaging the property to the other defendant. They bring this suit to obtain a declaration that the mortgage was an illegal transaction. It is a suit which must be brought under s. 42 of the Specific Relief Act, or it cannot be brought at all.

Upon this state of facts, the widow's possession—which the plaintiffs themselves allege to be an actual possession—must have one of two characters. Either it is a possession by the plaintiffs' consent, entitling her merely to receive the profits for her maintenance, or it is a possession for her life, given to her in exchange for the annuity which, under the arrangement I have referred to, she has released to the plaintiffs. In either case, I am of opinion that the suit is not maintainable. If her possession is merely

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permissive, and extends no further than the collection of the profits, then the plaintiffs may eject her from the property, if they are at any time dissatisfied with her mode of dealing with it. Then, before they can claim the relief provided by s. 42 of the Specific Relief Act, they must claim the other relief to which they are entitled—that is to say, the relief of ejectment, that being the substantial and real relief appropriate to such a cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for the annuity which she had released to the plaintiffs, then she possessed an interest which, so far as I can see, she had a right to dispose of. The mortgage-deed in question contains no description of the amount of the estate mortgaged by her. It is expressed with extreme vagueness, and, upon its face, mortgages her share of the property only. It could therefore have no operation beyond her share; and, in my opinion, no Court would be justified in interfering, and in making such a declaration as the plaintiffs ask for, merely because the deed is so vague that they apprehend that some imaginary claim may possibly be made by somebody at some time or other. Under these circumstances, I am of opinion that the suit and the appeal must be dismissed. Each of the respondents will be allowed his own costs separately.

OLDFIELD, J.—I agree in the opinion that this is not a case in which the declaration sought for should be granted. I may add that we have heard the appeal on its merits, and I see no reason to interfere with the decision of the Court of first instance. The appeal is dismissed with two sets of costs.

Appeal dismissed.

1885 December 12.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAGHUNATH PRASAD (DEFENDANT) v. GOBIND PRASAD (PLAINTIFF)*

Hindu Law—Joint-family—Power of the father to alienate ancestral property for pious purposes.

According to the Hindu law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande* v. *Babu Kunwar Singh* (1) referred to.

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* Second Appeal No. 168 of 1885, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 6th January, 1885, reversing a decree of Babu Khetar Mohan Ghose, Offg. Munsif of Cawnpore, dated the 22nd July, 1884.

(1) S. D. A., L. P., 1843, vol. 5, p. 24.

In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended that the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower appellate Court for the purpose of ascertaining whether the endowment had been made *bonâ fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Nand Lal*, for the appellant.

Mr. *Shivanath Sinha* and Lala *Lalta Prasad*, for the respondent.

BRODHURST and TYRRELL, JJ.—This is a suit brought by an adult son against his father and the trustee of an idol, on whom the father conferred a house and some moveable effects by a deed executed on the 6th May, 1881.

It is conceded that the father and the son are joint owners of a considerable ancestral estate. It is also unquestionable that the shares of the parties in case of a partition between them would be half and half each. On the 8th April, 1884, the son brought this suit to cancel the deed of transfer, on the single ground that, under the Hindu law, his father was incompetent to make any disposal whatever of the ancestral estate without his, the son's, consent.

The first Court tried this issue and decided it in favour of the father, dismissing the claim of the plaintiff. The latter pleaded in appeal before the District Judge the absolute inability of his father to deal with the property as he had done, the absence of any legitimate necessity for the alienation in question, and, finally, that the motive of the endowment was not piety to the gods, but malice against the son, who had interfered with a previous disposition of a portion of the property in favour of Musammat Gumti, a sister of the plaintiff. The Judge found that the father's powers to make an alienation of ancestral estate against the will of his son would not extend to provision of a permanent shrine of a family idol; and that, even if it did, the alienation should be restricted to "a small portion" of the estate. The Judge, holding that the alienated property represented a value of Rs. 693 out of an entire estate worth Rs. 4,000, decided that the gift was exclusive, and decreed the appeal and the suit. This decision challenged in second

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appeal; and an examination of the authorities is sufficient to show that a father is competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make "pious and reverential gifts to Brahmans, as Brahmutra Krishnarpana," also "gifts from affection towards Vishnu and other divinities"—*Gopal Chand Pande* v. *Babu Kunwar Singh* (1). The finding of the Judge on this point therefore cannot stand; and we are not informed on what materials he based his finding that the value of the estate is Rs. 4,000 only. The Judge has also omitted to decide the important plea as to the real motive underlying the gift—that is to say, the question of the good faith of the donor.

We have not materials on the record to enable us to dispose of these questions. We therefore refer the following issues for trial under s. 566 of the Civil Procedure Code:—

1. What is the value of the entire ancestral property of the parties to the suit?

2. Has the endowment been made *bonâ fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff-respondent, as pleaded by him in his fifth plea before the Judge?

On receipt of the findings, ten days will be allowed for objections.

Issues remitted.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1885 *December* 18.

PAIGI AND ANOTHER (DEFENDANTS) *v.* SHEONARAIN (PLAINTIFF).*

Husband and wife—Hindu law—Restitution of conjugal rights—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.

In a suit by a Hindu, a *sunar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual

* Second Appeal No 256 of 1885, from a decree of W. R Barry, Esq, Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 13th January, 1885, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 17th April, 1884.

(1) S. D. A. L. P., 1848, vol. 5, p. 24.

excommunication, and, upon making certain amends, he could obtain restoration to his caste.

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Held that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or the other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

Held, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

Held also that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights.

The facts of this case are stated in the judgment of Straight, J.

Babu *Baroda Prasad Ghose*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

STRAIGHT, J.—This is a suit brought by the plaintiff, Sheonarain, a *sunar* by caste, against Musammat Paigi, his wife, and Musammat Sarasuti, his mother-in-law, for restitution of conjugal rights.

His allegations are, that he was married to the defendant Musammat Paigi eight years ago; that she now refuses to cohabit with him, and that she is kept from doing so by the second defendant, her mother.

The defendants pleaded two matters in reply. In the first place, it was pleaded that, under an agreement of the 1st June, 1876, the plaintiff had, prior to his marriage to the defendant No. 1, undertaken to live in the house of his mother-in-law, defendant No. 2, with his wife after marriage; that defendant No. 1 was married to him on that condition; that he has left the house and refuses to live in it, and is therefore not entitled to enforce

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his marital rights, and that the defendant No. 1 can consequently withdraw herself from him. In the second place, it was pleaded that the plaintiff, having taken a Muhammadan woman as his mistress, and having lived and eaten food with her, has been put out of caste; and that, under these circumstances, defendant No. 1 cannot be called upon to go back to him, as, if she did, she would be excluded from caste herself. As to the first of these defences, I need scarcely say it is absurd, and of course could not be seriously entertained in a Court of law, and need not be noticed further.

Both the Courts below have given the plaintiff a decree, and the defendants are appellants before us from the decision of the Subordinate Judge.

The pleas in appeal are in substance as follows: —

1. That as the plaintiff is still out of caste, the defendant, his wife, is not bound to return to him.

2. That until he has been restored to caste no cause of action can accrue to him.

Now it has been found by both the Courts that the plaintiff did leave his wife and cohabit with another woman, whom now, however, he has given up, and was consequently turned out of caste; but that the impropriety and breach of caste rules and regulations of which he was guilty was of such a character and description as did not render him liable to perpetual excommunication; but that, upon his making certain amends, by feeding his caste-fellows, he can obtain restoration to his caste that of a *sunar*. This is now admitted to be so on both sides.

Now I need scarcely say that unless we can hold that by being excluded from caste under the circumstances I have mentioned, the plaintiff had extinguished his ordinary civil rights as a husband to require his wife to live with him, or that, in other words, the marriage had, under the Hindu law, thereby been dissolved, he is entitled to come into court to seek the relief he asks, if he is not otherwise disqualified from obtaining it. But while entertaining this view, we are, I think, bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she may raise to

such process being granted, either on the ground that she has been subjected before to personal injury or cruelty at the hands of her husband, or that she goes in fear of one or the other, or that the husband is actually living in adultery with another woman, or that, if she resume cohabitation or association with him, he being outcasted, she will herself incur the risk of being put out of caste.

I therefore think that, in decreeing a claim of this description, a Court is entitled, if it sees good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case fairly demand.

Applying this principle to the present case, it seems to me that the defendant Musammat Paigi may reasonably ask us, before compelling her to return to her husband, to make it a condition that he shall first obtain his restoration to caste, and to this extent I think her appeal should succeed. Having looked into the authorities on the subject, I am not prepared to hold, until corrected by a higher tribunal, that, under the Hindu law, the fact that a husband has had adulterous intercourse with another woman, which has ceased at the time of suit, is an answer to a claim by him for restitution of conjugal rights.

Before stating what the decree here should be in terms, I have to observe, with reference to Musammat Sarasuti, that no case whatever has been made out by the plaintiff for making her a party to the proceedings, and the suit as against her must be dismissed. It only remains for me to direct that the decree be framed in the following terms:—

It is ordered and decreed that this appeal be decreed; that the suit in respect of Musammat Sarasuti do stand dismissed; and that it be declared that the plaintiff is entitled to his conjugal rights as to Musammat Paigi; and that, upon his obtaining his restoration to his caste, the defendant Musammat Paigi, his lawful wife, do and is hereby ordered to return to his protection within one month of such restoration to caste and of request by him to her to return thereto.

In the event of the plaintiff satisfying the condition of this decree, and the defendant Musammat Paigi wilfully failing to obey

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its directions, her obedience will be enforced in manner provided by s 26 of the Civil Procedure Code.

The costs of this appeal will be paid by the respondent, who will also pay the costs of Musammat Sarasuti throughout the litigation.

The defendant No. 1 will pay her own costs in the Court below.

TYRRELL, J.—I concur.

Appeal allowed.

1885 December 18.

Before Mr Justice Straight and Mr Justice Tyrrell.

GANGA RAM AND ANOTHER (DEFENDANTS) *v* DATA RAM AND ANOTHER (PLAINTIFFS)*

Appellate Court, powers of—Withdrawal of suit—"Decree"—Appeal—Civil Procedure Code, ss 373, 582

Where on appeal from a decree dismissing a suit, the appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under s 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one—*held* that the order of the appellate Court was a "decree" within the meaning of the Civil Procedure Code, and afforded a proper ground of second appeal to the High Court.

Per STRAIGHT, J., that, with reference to the terms of s. 582 of the Civil Procedure Code, the appellate Court had power to avail itself of the provisions of s 373, and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one *Gregory* v. *Dooley Chand Kandaiy Mull* (1) and *Khatoon Koonwar* v. *Hurdoot Narain Singh* (2) referred to.

Also *per* STRAIGHT, J., that it could not be said that the appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal.

Per TYRRELL, J, that it might be taken that the appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint the basis of the suit and the decree, and that, in this view, there was no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code

THE plaintiffs sued the defendants for the following reliefs:—(*a*) that a wall which they represented had been built on their land by

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* Second Appeal No 206 of 1885, from a decree of H A Harrison, Esq, District Judge of Meerut, dated the 11th December, 1884, affirming a decree of Maulvi Munim-ud-din Ahmad, Munsif of Ghaziabad, dated the 11th September, 1884.

(1) 14 W. R. O. J. 17. (2) 20 W R 163.

the defendants might be ordered to be demolished; (b) that they might be put in possession of 7 bighas and 13 biswas of land of which they alleged they had been dispossessed by the defendants. The defendants, in their written statement, objected to the plaint as not being sufficiently specific, both in regard to the situation of the wall sought to be removed and also to the boundaries of the land sought to be recovered.

The Munsif of Ghaziabad, who tried the suit, was of opinion that he was not entitled to reject the plaint upon this ground, and proceeded to dispose of the suit on the merits, and in the result dismissed it. On appeal by the plaintiffs the District Judge of Meerut was of opinion that the plaint was informally drawn; that it did not state of how much land the plaintiffs had been dispossessed, or in what way the erection of the wall had deprived them of the land; and he expressed an opinion to the effect that the Munsif ought to have returned it for amendment before the first hearing. He added that, under the Full Bench ruling in *Damodar Das* v. *Gokal Chand* (1), no return for amendment could now be made, and in the result he gave the plaintiffs permission to withdraw the suit with leave to institute a fresh suit. He ordered the plaintiffs to pay all the defendants' costs up to that point.

From this decision the defendants appealed to the High Court on the following grounds:—

1. That the Judge, as a Court of appeal, had no power to make the order he did.

2. If he had the power to do so, he exercised his power improperly and irregularly.

A preliminary objection was taken to the hearing of the appeal by the pleader for the respondents, upon the ground that the order of the Judge did not come within the definition of "decree" as used in the Civil Procedure Code, and it therefore could not be made the subject of second appeal.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

(1) I. L. R, 7 All. 79.

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STRAIGHT, J. (after stating the facts continued):—I must deal with this preliminary objection first, and upon it I have only this much to say, that it seems to me that the order with which the Judge closes his judgment must be treated and regarded as one disposing of the suit and the appeal before him. It must, I think, be held to have put an end to the decree which had been passed in the defendants' favour by the Munsif, and it was therefore such an adjudication as must be regarded in the light of a *decree*. In this view of the matter, it affords a proper ground for a second appeal to this Court.

The next question to consider is the first point taken by the appellant. Had the Judge, sitting as a Court of appeal, power to make the order he did, with reference to the provisions of s. 373 of the Civil Procedure Code? Now, by s. 582 of the Civil Procedure Code, it is provided that a Court of appeal shall have in appeals the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits, and the provisions contained in the previous portion of the Civil Procedure Code shall be applicable to appeals, so far as such provisions are applicable. It therefore comes to this, that, in so far as they may be applicable, a Court of appeal has power to avail itself of the provisions of s. 373. In this connection I may refer to a ruling of Sir Barnes Peacock—*Gregory* v. *Dooley Chand Kandary Mull* (1)—which, though delivered in reference to the provisions of the old Civil Procedure Code (Act VIII of 1859), read in conjunction with s. 37 of Act XXIII of 1861, may nevertheless be regarded as an authority in regard to the present Code. There it was held that a Court of appeal had the power to allow a plaintiff to withdraw a suit and institute a fresh one. In other words, it was there decided that a Court of appeal is, in this respect, placed in the same position as a Court of original jurisdiction; and if such Court of original jurisdiction has not done what it ought to do, then the Court of appeal may itself do what that Court ought to have done. I may observe that there is another ruling to the like effect—*Khatoon Koonwar* v. *Hurdoot Narain Singh* (2). Agreeing in the views expressed in those cases, I think, with

(1) 14 W. R. O. J. 17. (2) 20 W. R. 163.

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regard to the first contention of the appellants, that the Judge had power, as a Court of appeal, to make the order he did.

The only other point for consideration is, whether the Judge was right in making his order, or was the exercise of his discretion so unreasonable that we ought to set his order aside.

Now by s. 373 of the Civil Procedure Code, read with s. 582, the Judge had, as I have already ruled, a discretion to permit the plaintiffs to withdraw the suit with leave to sue again. That discretion the Judge has exercised; and, without expressing any opinion as to whether, had I been in his place, I should have taken the course he did, I think it enough to remark that I cannot say that he exercised his discretion so unreasonably or erroneously as to compel our interference with it in appeal.

Looking to all the circumstances of the case, I dismiss the appeal; but as the defendants might well have accepted the Judge's order which gave them all their costs, I think this appeal was a very unnecessary proceeding, and that they ought not to have any costs. Consequently each party will pay his own costs on the appeal.

TYRRELL, J.—The difficulty I felt in dealing with the procedure adopted by the lower appellate Court was, that a plaintiff could not, in my judgment, conceivably be allowed to withdraw, in the proper sense of that term, from a suit that had reached its termination in a decree. To allow a plaintiff to withdraw from a decreed suit is tantamount to allowing him to withdraw from the operation of the decree in that suit, which would stand, however, as a valid operative decree, such withdrawal notwithstanding, in favour of the defendant. In other words, it seemed to me that the District Judge, who had not in any way considered the decree in appeal before him, had not pronounced any decision on its legality or propriety, had left it in all respects undisturbed, could not allow the plaintiffs-appellants before him to withdraw from the suit under s. 373 of the Code, so as to enable them to bring a fresh suit. If there were no other obvious difficulties in the way, the subsisting decree of the Court of first instance would bar any second action in the same matter.

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But, on consideration, I think that we may take it that the Court below—though this was not done in express terms—meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect discerned by the Court of appeal in the plaint, the basis of the suit and the decree.

Taking this view of the meaning and effect of the decree before us, I see no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code; and in this view of the case I readily concur in the order proposed by my brother Straight.

Appeal dismissed.

1885 *December* 21.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

DURGA PRASAD (DEFENDANT) *v.* SHAMBHU NATH AND OTHERS (PLAINTIFFS) *

Mortgage—Suit by mortgagee for possession of the mortgaged property—Sale of mortgaged property by mortgagor—Pre-emption—Purchaser for value without notice—Adverse possession—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 144.

Under a registered deed of mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties, the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869, the mortgagors sold the property, and thereupon one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D*. In 1883, the mortgagee brought a suit against *D* to obtain possession under his mortgage.

Held, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (1) distinguished.

Held, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having

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* Second Appeal No. 156 of 1885, from a decree of G. E Knox, Esq, District Judge of Agra, dated the 4th November, 1884, affirming a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Agra, dated the 5th March, 1884.

(1) 14 Moo. I A. 101 ; 8 B. L. R., 122.

notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

Held, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.

ON the 20th May, 1869, Kunj Behari Lal, a defendant in this suit, on his own behalf, and as the *sarbarakar* or manager of Musammat Tejo, also a defendant in this suit, executed a deed of mortgage in favour of one Bakhtawar Mal in respect of a share in a village called Baroli and of other shares in other villages. The deed provided that the mortgagor should deliver possession of the mortgaged property to the mortgagees; that the latter should pay the Government revenue out of the profits, and also pay himself Rs. 270 yearly as interest, and pay the balance to the mortgagors; and that if what remained after the payment of the Government revenue did not amount to Rs. 270, the mortgagors should make good the deficiency, and as long as they did so, the mortgagors should not sue for the principal till the end of the year 1280 fasli, corresponding with the 7th September, 1873.

The mortgagees did not deliver possession of the property, and on the 13th September, 1870, the mortgagors sued them for Rs. 270, the interest for the first year, and obtained a decree against Kunj Behari Lal alone, Tejo being exempted. The mortgagors then came to an arrangement with the mortgagee. On the 18th March, 1871, they gave one Sham Lal, a servant of the mortgagee, a general power-of-attorney, which authorized him to take possession of all their property, including the mortgaged property, and to realize the profits and, after paying them a certain sum by way of maintenance, to pay the balance to the mortgagee on account of his debt. This power also authorized Sham Lal to collect the debts due to the mortgagors and pay them to the mortgagee on the same account. This power was apparently not acted on. On the 28th September, 1871, the mortgagors gave the mortgagee a bond for Rs. 1,000, out of which sum they were only paid Rs. 226, the balance being deducted as follows:—Rs. 375 were deducted as due under the decree mentioned above; Rs. 349 were deducted as the interest due on the mortgage-deed from the date of that decree to

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the date of the bond, and Rs. 60 were deducted on account of moneys advanced subsequently to the date of the mortgage-deed.

On the 19th June, 1874, Tejo executed a deed of sale of certain property in favour of the mortgagee in part satisfaction of the principal and interest due on the mortgage-deed, and Kunj Behari Lal also executed deeds of sale of certain properties in favour of the mortgagee in part satisfaction of the moneys due on the mortgage-deed and the bond. On the 21st September, 1874, the latter made another payment of Rs. 325, in part satisfaction of the money due on the mortgage-deed and the bond, by executing a deed of sale for that amount of certain property in favour of the mortgagee. In this deed the several sums which had been paid to the mortgagee on account of the mortgage and bond were set out, and it was stated that a balance of Rs. 3,105 was due to him.

In the meantime, on the 7th October, 1869, Kunj Behari Lal sold to one Bansidhar the share in the village Baroli, part of the property mortgaged by the deed of the 20th May, 1869, to Bakhtawar Mal. One Raghobar claimed the share by right of pre-emption and obtained a decree for it on the 2nd August, 1870. On the 20th April, 1871, Raghobar sold the property to Durga Prasad. Bansidhar and Raghobar had been in possession of the share, and Durga Prasad obtained possession of it on the date of the sale to him.

The present suit was brought in March, 1883, by the next friend of Shambhu Nath, the heir of Bakhtawar Mal, for possession of the property mortgaged to him by the deed of the 20th May, 1869. Durga Prasad and certain other persons to whom other portions of the mortgaged property had been transferred were made defendants jointly with the mortgagors.

The plaintiff alleged in his plaint that, having regard to the acknowledgments and part-payments by the mortgagors, the suit was within time, and that his cause of action arose in January, 1883, when the defendants refused to give him possession.

All the defendants defended the suit on the ground that it was barred by limitation, more than twelve years having elapsed from the date of the mortgage; and the defendant Durga Prasad further defended it on the ground that he and his vendor

had been in adverse possession of the share in the village of Baroli for more than twelve years, and the suit as regards that share was barred by limitation.

The Court of first instance (Subordinate Judge of Agra) held on the first point that, inasmuch as the mortgagors had down to the year 1874 repeatedly acknowledged the title of the mortgagee in several documents executed by them, and had not only paid him down to the 21st September, 1874, interest on the mortgage-deed, but had also paid him a portion of the principal, the suit was not barred by limitation simply because it had not been brought within twelve years from the date of the mortgage, but the plaintiff was entitled to the benefit of ss. 19 and 20 of the Limitation Act. The Subordinate Judge referred to *Mankee Koer* v. *Sheikh Mannoo* (1).

On the second point it was contended for the defendant Durga Prasad that the principle laid down by the Privy Council in *Brijonath Koondoo Chowdry* v. *Khelut Chunder Ghose* (2) and *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (3) applied to him, there being no difference between his position and that of a purchaser at an execution-sale. On this point the Subordinate Judge held that the defendant Durga Prasad was not in the position of a purchaser at an execution-sale, but was a person claiming under a voluntary alienation from the mortgagor. The Subordinate Judge further observed as follows:—"As a private alienee of the mortgagor a slight inquiry at the registration office would have disclosed to him the mortgage in favour of Bakhtawar Mal. If he did not make such inquiry, it was his fault, and he cannot be considered to be a *bonâ-fide* purchaser without notice. There is nothing to show that Bakhtawar Mal wilfully concealed his mortgage from him. Durga Prasad must therefore be held to have purchased the property subject to the plaintiff's mortgage."

The Subordinate Judge in the result gave the plaintiff a decree for possession of the mortgaged property, which, on appeal by the defendant Durga Prasad, the lower appellate Court (District Judge of Agra) affirmed.

(1) 14 B. L. R 315 (2) 14 Moo I. A 144; 8 B. L. R. 104.
(3) 14 Moo I. A. 101, 8 B L. R. 122.

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The defendant Durga Prasad again contended in second appeal that the suit was barred by limitation so far as it affected him.

Babu *Dwarka Nath Banarji*, for the appellant.

Mr. *T. Conlan*, for the respondents.

OLDFIELD and BRODHURST, JJ.—Kunj Behari and Musammat Tejo mortgaged the property in suit by a registered deed, dated 29th May, 1869, to the plaintiff. Under the deed the plaintiff had a right to immediate possession: by arrangement, however, between the mortgagors and mortgagee, the former remained in possession. The right, however, of the plaintiff to obtain possession as against the mortgagors was kept alive. The mortgagors, however, on the 7th October, 1869, sold the mortgaged property in suit to one Bansidhar. One Raghobar brought a suit in respect of the sale to enforce pre-emption and obtained a decree in his favour and got the property; and he made a sale of it on the 20th April, 1871, to the defendant in this suit.

The plaintiff-mortgagee has now brought this suit against the defendant to obtain possession under his mortgage. The suit was instituted on the 17th March, 1883. His claim has been decreed, and the material question in appeal is, whether the defendant can successfully plead limitation against the plaintiff.

It has been contended that Raghobar, who obtained the property by asserting a right of pre-emption by suit, is in a better position than an ordinary purchaser by a private sale, and has a position analogous to that of a purchaser at an execution-sale; and that his possession was not as mortgagor and in acknowledgment of the continuance of the title of the mortgagee, but as absolute owner; and his possession and subsequent possession of defendant will be adverse to the right of the mortgagee, and the suit barred by limitation; and we are referred to the case of *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (1). The position, however, of a person who purchases property by asserting a right of pre-emption is not, in our opinion, analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser and enters into the same contract of sale with the vendor that the purchaser was making. There is privity

(1) 14 Moo. I. A. 101; 8 B. L. R. 122.

between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. The case of *Anundoo Moyee Dossee* (1) is therefore not applicable. Moreover, that case was not governed or decided under the present Limitation Act. Art. 144, Act XV of 1877, is the law which governs this case; and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. There is nothing to show—and it is not pretended—that until recently, when the present dispute arose, there were any conflicting claims in respect of the mortgage from which the assertion of an adverse title on the defendant's part against the plaintiff can be gathered, so as to make his possession adverse. The lower Courts have further held that the defendant-appellant had constructive notice of the mortgage by reason of the instrument being registered. This is a question which need not be discussed. It would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage; but his not having notice of it otherwise will not affect his liability.

The principle on which Courts of Equity in England refuse to interfere against *bonâ-fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, has no applicability in our Courts.

There is no equitable ground why the plaintiff's right under the mortgage should be defeated by the defendant's purchase. It has priority; and if the defendant had no notice, it will not affect the plaintiff, who was not responsible for that.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr Justice Tyrrell.

1885 *December 24.*

BHAGWANT SINGH AND ANOTHER (PLAINTIFFS) *v.* TEJ KUAR AND OTHERS (DEFENDANTS) *

Civil Procedure Code, s. 13—Res judicata.

Two-thirds of a village were sold by *T*, *P*, and *B*. *B* was the widow of *S*, her name being recorded in respect of the property formerly recorded in his

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* Second Appeal No 72 of 1885, from a decree of A F. Millett, Esq, District Judge of Shahjahanpur, dated the 12th November, 1884, affirming a decree of Maulvi Muhammad Ismail, Munsif of Biraulh, dated the 30th June, 1884.

(1) 14 Moo. I. A. 101; 8 B. L. R. 122.

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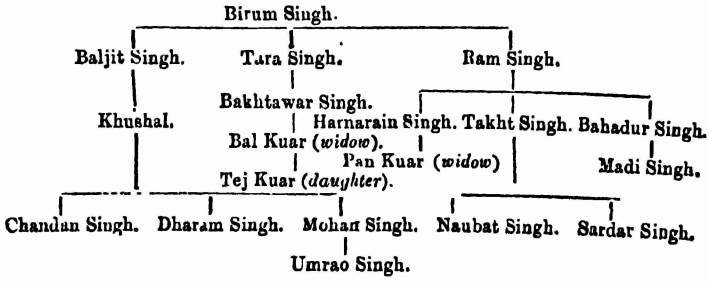
name, and what she sold was his one-third share in the village, the other one third being sold by *T* and *P*. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit *C*, *D*, and *M*, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one, and that *B* was not competent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After *B's* death, her daughter *K*, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of *C*, *D*, and *M*, against *K*, her mortgagee, and their vendors, to set aside the mortgage and recover the interests which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation.

Held that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against *K* in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with *B*, *K's* mother, and on the same side.

Shadal Khan v. *Amin-ullah Khan* (1) referred to by Straight, J, and distinguished by Tyrrell, J. *Narain Kuar* v. *Durjan Kuar* (2) referred to by Straight, J.

The following genealogical table is material to the question raised by this appeal:—



Birum Singh died possessed of a number of villages, which, on his death, devolved on his three sons, Baljit Singh, Tara Singh, and Ram Singh, in equal one-third shares.

Bakhtawar Singh, son of Tara Singh, died in 1858, leaving a widow, Bal Kuar, whose name was recorded in respect of the

(1) I. L. R., 1 All. 92. (2) I. L. R., 2 All. 738.

property recorded in her husband's name at the time of his death. On the 1st September, 1862, Takht Singh, one of the sons of Ram Singh, Madi Singh, one of his grandsons, Bal Kuar, and Pan Kuar, widow of Harnarain Singh, son of Ram Singh, sold to one Ram Prasad and certain other persons two-thirds of one of the villages mentioned above, called Bisauli. The vendors having refused to give possession of the property, the purchasers sued them for possession of it. Chandan Singh, Dharam Singh, and Mohan Singh were made defendants to the suit after its institution. They contended, amongst other things, that Bal Kuar was not competent to alienate her deceased husband's one-third share in Bisauli, as the family was a joint one. Bal Kuar contended that the three defendants named above were illegitimate, and therefore not competent to challenge the sale. Takht Singh and Madi Singh contended that they were the heirs to Bakhtawar's share. The question whether the family was joint was decided by the Court of first instance in the affirmative, and this decision became final in 1868.

In 1880 Bal Kuar died, and on her death Tej Kuar's name was recorded in respect of the property which had been recorded in Bakhtawar Singh's name, and, after his death, in Bal Kuar's name On the 2nd May, 1881, Tej Kuar gave a usufructuary mortgage of one of the villages above mentioned to one Makund Ram. In August, 1883, Umrao Singh, Naubat Singh, and Sardar Singh sold their interests in the same village. The purchasers brought the present suit against Tej Kuar, the heirs of the mortgagee, and their vendors, to set aside the mortgage by Tej Kuar and recover the interests which they had purchased. They alleged, *inter alia*, that at the death of Bakhtawar Singh, the family was joint and his rights and interests had passed on his death to the surviving male members of the family, and contended that the question whether the family was joint or not was *res judicata* with reference to the decision in the former litigation.

Both the lower Courts disallowed this contention.

In second appeal by the plaintiffs they raised the same contention.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

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Babu *Dwarka Nath Banarji*, Pandit *Bishambar Nath*, and Munshi *Hanuman Prasad*, for the respondents.

STRAIGHT, J.—I am clearly of opinion that this appeal fails. The only plea pressed upon us by the learned counsel is the first, which invites us to disagree with the view of the learned Judge upon the point of *res judicata*. Assuming, though without conceding it, that Musammat Tej Kuar would be bound by a decree formerly obtained against her mother, Bal Kuar, in respect of the subject-matter of the present suit, such decree would only be binding in the hands of the person who obtained it, or of persons claiming under a title acquired from him. The plaintiffs-appellants before us are not the assignees of Ram Prasad, the plaintiff in the suit of 1868, who, it may be remarked, was unsuccessful in that litigation, but of Chandan and others, who were arrayed in it as defendants along with Bal Kuar and on the same side. In that proceeding the question whether the family was joint or divided was not determined among the defendants *inter se*, but simply as against the plaintiff; and it could only be *res judicata* against him or parties claiming under the same title. My attention has been called to *Shadal Khan* v. *Amin-ullah Khan* (1). I can only say that if it was intended to lay down in that case that a decree in a suit makes all material questions raised therein *res judicata* as between the defendants to it, I must most respectfully but firmly express my dissent, which is only in accordance with the views expressed by me as far back as 1880, in the case of *Narain Kuar* v. *Durjan Kuar* (2).

This is the only point before us in second appeal, and such being my opinion with regard to it, the appeal must be dismissed, and is dismissed, with costs.

TYRRELL, J.—I concur in dismissing this appeal with costs, and will only add that in the case of *Shadal Khan* v. *Amin-ullah Khan*, it was especially noted that the parties to the former suit were in appearance only, and not in fact, on the same side or in the same array, but were, in fact, on opposite sides and controversially maintaining opposite propositions on the issues under trial.

Appeal dismissed.

(1) I. L. R., 4 All. 92. (2) I. L. R., 2 All. 738.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1885
January 2.

RAGHUBAR DAYAL AND ANOTHER (PLAINTIFFS) *v.* BUDHU LAL (DEFENDANT).*

Mortgage—Redemption—Suit to redeem brought before expiration of term of mortgage.

A mortgage-deed, dated the 15th March, 1883, stipulated that the mortgagor would "pay the interest every year, and the principal in ten years," that "the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July, 1884.

Held, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju* v. *Vadju* (1) referred to.

THE plaintiffs in this suit, the purchasers of one of two houses mortgaged by one Janki Prasad, sued to redeem the mortgage. The defendant set up as a defence that the term of the mortgage had not expired, and therefore the mortgage was not redeemable.

The material portion of the deed of mortgage, which was dated the 15th March, 1883, was as follows:—

"I, Janki Prasad, do hereby declare that I have borrowed Rs. 200 of the Empress of India's coin, half of which is Rs. 100, with interest at the rate of Rs. 2 per cent. per mensem, from Budhu Lal, in order to pay two instalments of mortgage-money due to Gopi Lal, and also to carry on my own business, and mortgage the two pucca-built houses situate in Etáwah, which are already hypothecated to Gopi Lal, promising to pay the interest every year, and the principal in ten years. The money has been received in this way:—Rs. 100 have been left with the creditor to pay the instalments due to Gopi Lal, and the remaining Rs. 100 have been

* Second Appeal No. 338 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 16th December, 1884 reversing a decree of Lala Mata Prasad, Munsif of Etáwah, dated the 31st July 1884.

(1) I. L. R., 5 Bom. 22.

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received in cash. The agreement is that the principal shall be paid at the promised time, and the interest every year. In any year in which the interest is not paid up, it shall be calculated and added as principal, and interest shall be charged thereon at the above rate till the date of payment; and in this way every item of interest shall be calculated as principal, and interest shall be charged on the aggregate amount. If the principal, interest, and compound interest is not paid up at the stipulated period, then the creditor is at liberty to realize his money from the houses mortgaged and from my other moveable and immoveable property and my person by bringing a suit. I will not transfer the property mortgaged until the payment of the debt. If I do, the transfer shall be null and void."

The suit was instituted on the 16th July, 1884.

The Court of first instance (Munsif of Etáwah) held as follows on the question whether the mortgage was redeemable within the term of ten years:—"It is true that the term fixed for the repayment of the mortgage-money is ten years, but there is not a word in the mortgage-deed prohibiting or precluding the mortgagor from getting the property redeemed before that period. In the absence of a contract to the contrary, I see no reason why the mortgagor or the plaintiffs should not be allowed to repay the debt and protect themselves from the future burden of the interest to be accumulated"

On appeal by the defendant the lower appellate Court (Subordinate Judge of Mainpuri) held that the mortgage was not redeemable within the term, observing as follows:—

"I think that the claim brought within the stipulated period of ten years is improper for the following reasons:—

In the first place, the mortgage-deed has the words 'on a promise to pay the principal amount in ten years.' It does not provide that the money shall be paid within ten years but provides that it shall be paid in full ten years. Secondly, s. 60, Act IV of 1882, provides that on the principal mortgage-money becoming payable, a mortgagor is at liberty to tender its payment at any time he likes and demand that the mortgage-deed should be returned to him if the mortgage is without possession, or that he

should be put in possession if the mortgage is accompanied by possession. Hence this section provides that payment shall be made after the money has become payable—that is, after the expiration of the term of the bond and not within it. Thirdly, in the precedent *Vadju* v. *Vadju* (1) the suit brought within the stipulated period was held to be unmaintainable. Although that mortgage was accompanied by possession, yet the principles laid down in the precedent are not inapplicable to this case. There are times fixed for redemption and foreclosure of mortgage. In this case also a redemption can be made and the mortgagee can obtain a decree and bring the property to auction sale at proper times. Fourthly, the suit is untenable also according to justice, because the creditor has lent his money for profit, *i.e.*, to take interest for the stipulated period. His money is secure, and he will take compound interest. If his money be paid within the stipulated time, he will be deprived of the profit. Had it been the intention of the contracting parties that the money should be paid within the stipulated time, it would have been distinctly provided in the mortgage-deed that if the mortgagor should pay the money within that time, it shall be taken. But the mortgage-deed contains no condition to this effect, nor do the words 'within the stipulated period' occur in it. Hence I find that the suit brought within the stipulated time is unmaintainable."

The plaintiffs appealed to the High Court,

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

STRAIGHT, J.—In this case the plaintiffs-appellants are the assignees of certain mortgagors under a mortgage-deed, dated the 15th March, 1883, of a house charged as security for the mortgage-debt, and the plaintiffs in this case sue for redemption of the mortgage and bring the money into court for that purpose. The plea of the defendant-respondent is, in effect and substance, that the suit is premature; that the term of the mortgage was ten years, and that neither the plaintiffs nor their assignor was in a position,

(1) I. L. R., 5 Bom. 22.

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under the terms of the instrument, to redeem the property before the ten years had expired. The lower appellate Court has adopted this view, and it is this decision of the Court which is impeached by the appeal before us.

The primary question is, under the term of the instrument of the 15th March, 1883, what was the time at which the principal money advanced on the mortgage was payable by the mortgagor to the mortgagee? In other words, after what date would the mortgagee be able to enforce his rights under the mortgage-deed?

I have no doubt that the lower appellate Court was right in the construction placed by it on the instrument of the 15th March, 1883, that the advance of Rs. 200 by the mortgagee to the mortgagor was for a period of ten years certain, and that while, on the one hand, the mortgagee could not enforce his rights during that period, on the other hand the mortgagor was not entitled before that period had expired to redeem the property. It is essentially a case in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal; and there is nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of this nature. Moreover, in the deed itself it is provided that the principal money is to be paid "at the promised time," and that, in default of such payment, certain contingencies shall arise. Reading this expression with the rest of the language of the instrument, it is obvious that by "promised time" was meant a specific point of time, and that was the period of ten years for which the mortgage was made. I may add that I entirely concur with the views of the learned Judges of the Bombay High Court expressed in *Vadju* v. *Vadju* (1), with regard to the principles which should be applied to such matters, and to which expression had been given in ss. 60 and 61 of the Transfer of Property Act.

The appeal must be dismissed with costs.

TYRRELL, J.—I am of the same opinion.

Appeal dismissed.

(1) I. L. R. 5 Bom 22.

CRIMINAL REVISION.

1886
January 15.

Before Mr. Justice Oldfield.

QUEEN-EMPRESS *v.* JOKHU AND ANOTHER.

Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue nuisance—Act XLV. of 1860 *(Penal Code), s.* 291—*Criminal Procedure Code, ss.* 134, 143, 144, *sch.* v., *Form* 20.

To support a conviction under s. 291 of the Penal Code, there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person.

A Magistrate's powers to deal with public nuisances are contained in Chapters X. and XI. of the Criminal Procedure Code. Chapter XI. is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144 of the Code, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.

THIS was an application to the High Court for revision of an order of Mr. P. Gray, Joint Magistrate of Allahabad, dated the 22nd October, 1885, convicting the petitioners, Jokhu and Cheti, of an offence under s. 291 of the Indian Penal Code.

The first ground of the application was that "the petitioners were not, within the meaning of s. 291 of the Penal Code, enjoined by any public servant to discontinue the public nuisance complained of."

The facts of the case are stated in the judgment of the Court.

Mr. *A. Strachey*, for the petitioners.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

OLDFIELD, J.—It appears that the Magistrate received a petition on the 16th September, 1885, complaining of a nuisance caused by cultivators of fields in the petitioners' neighbourhood spreading nightsoil as manure on their fields. No one was named

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in this petition ; and upon it the Magistrate issued a proclamation forbidding, in general terms, any person spreading nightsoil on his fields so as to cause disease or annoyance.

The proclamation was issued on the 19th September. On the 10th October, one Ali Jan charged Jokhu, the petitioner, and another person who is not before this Court, with offences under ss. 278, 290 and 291, with reference to spreading nightsoil on their fields.

The police were directed to send up the accused. They sent up Jokhu and Cheti, the petitioners now before this Court, (the latter not being one of those whom Ali Jan had charged) ; and the Magistrate instituted a prosecution against them under s 291, and convicted them of an offence under that section, and sentenced them to a fine of Rs. 25 each, or simple imprisonment for one month. A petition has been presented for revision, on the ground that no offence under s 291 has been committed ; and in my opinion this is the case. S. 291 is as follows : "Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, or with both."

To support a conviction, there must be proof of an injunction to the petitioners individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code ; and it is the infringement of this order or injunction that is punishable under s 291 of the Indian Penal Code ; and it is clear that what is contemplated is an order addressed to a particular person (see sch. V., Form 20).

In the case before me, these requirements have not been fulfilled. The only order of the Magistrate is contained in the proclamation addressed generally to the public at large. It sets out that some

persons, not named, have committed a nuisance by spreading nightsoil on their fields; and all cultivators are ordered to refrain from spreading nightsoil so as to cause disease or annoyance. It is difficult to see how any cultivator could take this order as necessarily applicable to himself. The act of using nightsoil as manure is not in itself a public nuisance; and each cultivator might suppose in his individual case that the nightsoil he used would not cause disease or annoyance so as to be an infringement of the order. S. 291 contemplates a wilful breach of an order against repeating or continuing a public nuisance; and the order must be brought home to the individual charged before he can be convicted under that section.

I may add that the Magistrate had no authority for the procedure he adopted in issuing the proclamation. His powers to deal with public nuisances are contained in Chapters X. and XI. of the Criminal Procedure Code.

The provisions of Chapter X. contemplate orders to be directed to, and served on persons individually, and that opportunity shall be given to show cause against the order; and service of the order is to be made on the person against whom the order is made, if practicable, in the manner provided for service of summons; and it is only if such order cannot be so served, that it may be notified by proclamation published in such manner as the Local Government may by rule direct (s. 134).

It is only in emergent cases, to which Chapter XI applies, that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual.

In such emergent cases the order, which is to be served in the manner provided by s. 134, may be directed to "the public generally when frequenting or visiting a particular place" (s 141). That is to say, an order may, under s. 144, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision has no applicability to an order of the nature contained in the Magistrate's proclamation, which was directed to a portion of the community, and had no concern with the public generally, frequenting or visiting a particular place.

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I notice this point as the Public Prosecutor referred to Chapter XI., and particularly this part of s. 144, to support the action of the Magistrate in issuing the proclamation. I may add that Chapter XI. is only properly applicable to temporary orders in urgent cases; and the order here was not of a temporary character; nor is there anything to show that the Magistrate considered immediate action necessary under this Chapter.

I have been asked by the Public Prosecutor to alter the conviction to one of an offence under s. 290,—committing a public nuisance—or other which the evidence may prove to have been committed. But this is not a case in which such action on the part of a Court of Revision is desirable, assuming it to have the power. The petitioners were only put on their defence in respect of the charge under s. 291, and the case was tried summarily; and there is no evidence on the record to which this Court can refer, so as to say that any offence has been committed; and it is, moreover, undesirable to take up now a charge in respect of a public nuisance, which, if it was committed, is a thing of the past.

The convictions and sentences are set aside, and the fines will be refunded.

Convictions set aside.

FULL BENCH.

1886 *January* 20.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

KARIM BAKHSH KHAN AND OTHERS (DEFENDANTS) *v.* PHULA BIBI (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in wajib-ul-arz—Purchaser entitled to recover purchase-money.

The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid

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* Second Appeal No. 1344 of 1884, from a decree of G. J Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 15th August, 1884, affirming a decree of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 20th June, 1884.

should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger, for a price higher than that which would be payable according to the above-mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers.

Held by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to anyone else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor.

Akbar Singh v. *Juala Singh* (1) distinguished by TYRRELL, J.

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a two annas share of a village called Baranpur. This share had been sold by the defendant, Zahur Khan, a co-sharer, to the other defendants, strangers, the sale-deed being dated the 9th April, 1883, and the price stated therein being Rs. 750. The suit was based on the *wajib-ul-arz*. That document provided that a co-sharer, before selling his share to a stranger, should offer it to his co-sharers; and further, that the price to be paid, in case of sale to a co-sharer, should be calculated with reference to the price for which the share of one Karam Khan had been sold in 1860, which was Rs. 198. The plaintiff claimed the benefit of the sale upon payment of Rs. 148-8-0, the amount proportionate to the price of the share mentioned in the *wajib-ul-arz* as the standard of price in sales between the co-sharers of the village. The defendants-vendees pleaded (*inter alia*) that they were entitled to payment by the pre-emptor of the price mentioned in the sale-deed, the same having been actually paid by them to the vendor, and that the conditions of the *wajib-ul-arz* above referred to were not binding on them.

Both the Court of first instance (Subordinate Judge of Azamgarh) and the lower appellate Court (District Judge of Azamgarh) decreed the plaintiff's claim, conditionally on payment by her of Rs. 148-8-0, that being the amount of consideration payable according to the provisions of the *wajib-ul-arz* relating to sales between the co-sharers.

(1) Weekly Notes, 1885, p. 216.

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KARIM BAKHSH KHAN v. PHULA BIBI.

The defendants appealed to the High Court. The appeal came on for hearing before Petheram, C. J., and Straight, J., who made the following order of reference to the Full Bench :—

"The only plea pressed on us in this appeal is the third plea, which raises the following question, namely :—Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is binding upon the stranger-vendee without notice. According as this question is decided in the affirmative or the negative by the Full Bench, this appeal will be decided."

The question referred was altered by the Full Bench to read as follows :—

"Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is still binding on the land, notwithstanding the sale to the vendees."

Lala *Juala Prasad*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

PETHERAM, C. J.—I am of opinion that the answer to this reference, as altered, should be in the affirmative. The facts of the case are, that by the *wajib-ul-arz* of the village concerned it was agreed by the co-sharers that, if any of them desired to sell his share, he should offer it to the others before selling it to a stranger; and also that the price of the property, if sold to any of themselves, should be so much a share. One of the co-sharers sold his share to strangers for a greater price than that mentioned in the *wajib-ul-arz*. A suit is brought by another of the co-sharers against the vendor and against the purchasers, in whose possession the share is; and the question arises whether, under the circumstances, the plaintiff is entitled to possession of the share on payment of the price agreed upon under the *wajib-ul-arz*. I am of opinion that he is. It has always been considered—and this view has been acted upon—that agreements of this nature run with the land to this extent, that a co-sharer wishing to purchase, and to whom the property has not been offered, can follow it in the hands of the vendee, and get possession of it himself. If this is so, the agreement so far runs with the land; and if it does so to any extent, it must, in my opinion, do so to the full extent of the agreement,—that is to say, a co-sharer is entitled to purchase at the

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price agreed, before the property can be sold to any one else. As soon, therefore, as a co-sharer finds that another co-sharer has sold his share, he can call on the vendor and the purchaser to hand it over, upon payment of the price which he agreed to pay to those who were parties to the agreement. If the purchaser has paid more than was stipulated for in the agreement, he may get it back from the vendor. The pre-emptor can get the land under the original contract, that is to say, upon payment to his co-sharer of the price mentioned in the *wajib-ul-arz*; and the purchaser can recover the price which he paid, whatever it was, because the consideration has failed, and he has not got the land. For these reasons, I am of opinion that the answer to the reference, as altered, must be in the affirmative, and that the appeal must consequently be dismissed with costs.

STRAIGHT, J.—I am of the same opinion.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion. The ruling in *Akbar Singh* v. *Juala Singh* (1) is distinguishable. The standard in this case is fixed and inflexible; in that case it was only a practicable alternative price to be adopted in the event of the selling and purchasing co-sharers being unable to agree together what the fair price should be.

1886 January 22.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAGHUNATH PRASAD (PLAINTIFF) v. JURAWAN RAI AND ANOTHER (DEFENDANTS).*

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to the first mortgage.

In 1874 a plot of land, No. 111, which in 1866, had been mortgaged to *L*, was with other property mortgaged to *R*. In 1878 the equity of redemption in plot No. 111 was purchased by *J*, who paid off the mortgage of 1866. *R* brought a suit against *J*, to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage

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Appeal No. 6 of 1885, under s. 10, Letters Patent.

(1) Weekly Notes 1885, p. 216.

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of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874.

The Full Bench modified the decree of the Court of first instance by inserting after the words "land No. 111 be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff as second mortgagee only to be sold."

Per OLDFIELD, J., that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

Per STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866: in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it enured.

THIS was an appeal to the Full Court, under s. 10 of the Letters Patent, from a judgment of Oldfield, J., dated the 19th March 1885. The facts out of which the appeal arose were as follows:—Jurawan Singh and Daulat Kuar, co-sharers in a village called Chattardih, mortgaged a plot of land, No. 111, situate in that village, to one Lachman Rai, in May, 1866, for Rs. 401, the mortgage being a usufructuary one. Subsequently, on the 9th June, 1874, the mortgagors executed a simple mortgage of their four annas share in the village, including plot No. 111, to Raghunath Prasad. In June, 1878, the mortgagors executed a deed of sale, in respect of plot No. 111, in favour of Jurawan Rai and others, who paid off the mortgage of 1866 to Lachman Rai. In October, 1882, the second mortgagee, Raghunath Prasad, sought to bring the four annas share to sale by enforcement of his mortgage of June, 1874.

The Court of first instance (Munsif of Balia) decreed the claim in part, exempting from the decree plot No. 111, on the ground that it had been purchased by Jurawan Rai and others, who had paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874. On appeal, the Subordinate Judge of Ghazipur observed as follows:—"The prior mortgage, which is alleged to have been satisfied out of the sale-price paid by Jurawan Rai, Suhawan Rai and Musammat Jairi, ceased to exist on the day it was satisfied. The mortgage to the plaintiff continued

to exist even after the prior mortgage was extinguished. Besides, the purchasers, having purchased the property (land No. 111) after it had been mortgaged to the plaintiff, must be held to have purchased it subject to the mortgage to him, and he is therefore entitled to enforce his mortgage on it. The decision of the lower Court is modified, and this appeal decreed by enforcing the plaintiff's mortgage on field No. 111, with cost of both Courts, and interest at the usual rate."

An appeal from this decree was preferred to the High Court, and came on for hearing before Oldfield and Mahmood, JJ. The judgments of the learned Judges will be found reported in I. L. R., 7 All. 569, and *Weekly Notes*, 1885, p. 112. The learned Judges differed in opinion, Oldfield, J., holding that "the prior mortgage was not extinguished, and that it afforded a defence against the claim seeking to bring the property to sale;" and that the decree of the lower appellate Court should be modified and that of the first Court restored; and Mahmood, J., holding that "a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage," and that the appeal should be decreed, and the case remanded to the lower appellate Court for disposal under s. 562 of the Civil Procedure Code.

The plaintiff appealed to the Full Court from the judgment of Oldfield, J., under s. 10 of the Letters Patent.

Mr. *G. T. Spankie*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

PETHERAM, C. J.—I am of opinion, after reading the judgments of the two learned Judges of the Division Bench, and looking into the facts of the case, that on the part of one, at all events, of those learned Judges, there was some misapprehension as to the real facts, and that, had it not been for that misapprehension, no difference of opinion could have arisen. Under these circumstances, I am of opinion that the proper mode of dealing with the matter is to alter the Munsif's order by inserting the words "in that property the interest of the plaintiff as second mortgagee only to be sold" after the words "land No. 111 be exempted from the hypothecation lien." The order as amended will be returned to the first Court for execu-

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tion. As regards costs, the Munsif's order will stand, but in reference to the proceedings subsequent to that order, there will be no order as to costs.

OLDFIELD, J.—I desire only to add that the suit was brought by the respondent against the first mortgagee of three bighas of land and in possession thereof, that mortgage being usufructuary; and I understood, and still understand, that the object of the suit, which was brought by a second mortgagee holding a second mortgage on the same property, was to bring the land to sale so as to oust the first mortgagee and get rid of his mortgage without satisfying it. This, I am of opinion, he cannot do. I was therefore in favour of affirming the decision of the first Court, dismissing the suit. The second mortgagee has a right to sell such interest as he possesses as second mortgagee, and in this view I see no objection to the form of the decree proposed by the learned Chief Justice.

STRAIGHT, J.—I have consented to this form of decree, because it virtually represents the relief to which the plaintiff is entitled, namely, to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866. In other words, a purchaser at a sale in execution of this decree will have no further right than a right to take the property subject to the charge of the first mortgagee, that is, to the first mortgagee's right to possession of the property included in his instrument, and his other rights under that instrument; so long as it enures.

BRODHURST, J.—I agree in the form of decree proposed by the learned Chief Justice.

TYRRELL, J.—I also agree.

1886 January 23.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Oldfield.

J. R. WILLIAMS (PETITIONER) v. T. A. BROWN AND OTHERS (OPPOSITE PARTIES).

"Decree"—Order dismissing a suit under Civil Procedure Code, s. 381—Civil Procedure Code, s. 2—Appeal.

The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree."

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* Miscellaneous No 218 of 1885.

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Held by the Full Bench that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code

THIS was a reference to the Full Bench arising out of an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The facts of the case sufficiently appear from the order of reference by Straight, J., in which Brodhurst, J., concurred, which was as follows:—

"This is an application to revise an order of the Subordinate Judge of Agra, passed on the 5th June last, dismissing a suit brought by the petitioner for failure to find security for costs as ordered. The order of the Subordinate Judge professes to be passed under s. 381 of the Civil Procedure Code.

"By way of preliminary objection to our entertaining this application for revision, Babu *Baroda Prasad* for the opposite party submits that the order of the Subordinate Judge, which is now impeached, constituted a decree; that, being a decree, it was open to appeal; and that, therefore, the condition precedent required by s. 622 is absent, and the application cannot be entertained.

"In reply to this contention, Mr. *Howard* submits that it is impossible, looking to the definition of the term '*decree*' in s. 2 of the Civil Procedure Code, to contend that the dismissal of a suit under s. 381 for default in finding security for costs is an adjudication upon a right claimed in a Civil Court by a party bringing a suit therein He frankly concedes that there is a ruling of this Court in *Siraj-ul-haq* v. *Khadim Husain* (1) decided by my brothers Oldfield and Brodhurst, JJ., which is adverse to the position he is asserting; but he has also called our attention to a ruling by my brothers Oldfield and Mahmood, JJ., in *Dianat-ullah Beg* v. *Wajid Ali Shah* (2) which favours his view. The question therefore appears to be one as to which there is some doubt; and speaking for myself, I should, with great deference to my brothers Oldfield and Brodhurst, hesitate about following the ruling of theirs above referred to. It certainly does appear to me to be a strong thing to hold that where a plaintiff, having been required

(1) I. L. R., 5 All 380. (2) Weekly Notes, 1884, p. 154.

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to find security for costs, fails to do so, and his suit is dismissed even before any statement of defence has been put in or issues have been fixed, such dismissal constitutes a decree within the meaning of s. 2 of the Civil Procedure Code, and amounts to an adjudication upon the rights alleged by him in his plaint, in respect of which he seeks relief.

"Under the circumstances, it seems to me that this preliminary question should be referred to the Full Bench for determination. I do order that it be so referred."

Mr. *J. E. Howard* and Mr. *G. Ross Alston*, for the petitioner.

Mr. *G. Ross Alston*, for the petitioner.—The order of the Subordinate Judge dismissing the suit under s. 381 of the Code was not a "decree" within the definition contained in s. 2: it was therefore not appealable under s. 540, and the plaintiff's only remedy is by way of revision under s. 622. By s. 2, a "decree" is "the formal expression of an adjudication upon *any right claimed* or defence set up in a Civil Court;" but the right adjudicated upon in the order under s. 381 is the plaintiff's right to sue, and not the right which he claims in the suit. The provision in Act VIII of 1859 analogous to s. 381 of the present Code was s. 35, and the words used in s. 36 were "order rejecting the plaint." If these words had been used in s. 381 of Act XIV of 1882, then, with reference to the latter portion of the definition of "decree" in s. 2, the proceeding would have been a decree; but the words in fact used are "dismiss the suit," and by substituting these for the words "rejecting the plaint," the Legislature must have intended that the order under s. 381 should not be regarded as a decree. Again, in s. 371 of the present Code, the dismissal of a suit on failure of a bankrupt plaintiff's assignee to give security for the costs of the suit, is called an "order" and not a "decree." The provisions of this section are analogous to those of s. 381; and the omission of orders passed under s. 381 from the orders enumerated as appealable under s. 588 must be regarded as accidental. Again, with reference to ss. 205 and 206, there can be no "decree" where there is no judgment, and where a suit is dismissed under s. 381 without any adjudication upon the matters in issue between the parties, there can be no "judgment" in the sense described in s. 203.

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Babu *Biroda Prasad Ghose*, for the opposite parties, was not called on to reply.

PETHERAM, C. J.—I am of opinion that the order under consideration was a "decree" within the definition of that term contained in s. 2 of the Civil Procedure Code. The plaintiff took the steps necessary to initiate his claim against the defendant, and filed his plaint. The defendant then made an application under the Code that the plaintiff be ordered to find security for costs, and accordingly an order to that effect was passed, which, upon the face of it, contained a provision that if security were not furnished within a certain time the suit should be dismissed. The security was not furnished within the time allowed; and thereupon a proceeding was drawn up, the effect of which was to dismiss the suit. The question before us is, whether this proceeding was the decree in the suit or whether it was a mere order. The definition of "decree" in s. 2 of the Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a decree; and it is impossible to contend that so long as this proceeding remained upon the record, the suit was not disposed of. I am therefore of opinion that the order in question was the decree in the suit, and was therefore appealable as a decree, and consequently is not open to revision by this Court under s. 622 of the Code. My answer to the question referred to the Full Bench is, that the order dismissing the suit for failure by the plaintiff to find security for costs as ordered, was a "decree."

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ., concurred.

1886
January 27.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Oldfield.

BADAMI KUAR (PETITIONER) *v.* DINU RAI AND OTHERS (OPPOSITE PARTIES).

High Court's powers of revision—Civil Procedure Code, s 622—"Jurisdiction"—"Illegality"—"Material irregularity."

A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the

* Application No. 63 of 1885, for revision under s 622 of the Civil Procedure Code.

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obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code.

Held, by the Full Bench, that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code.

The result of *Amir Hasan* v. *Sheo Bakhsh Singh* (1) and *Magni Ram* v. *Jiwa Lal* (2) is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final.

Per STRAIGHT and TYRRELL, JJ —Clauses (*a*) and (*b*) of s. 584, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (*c*) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, *i. e.*, some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Maulvi Muhammad* v. *Syed Husain* (3) referred to.

THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The record having been called for, the application came on for hearing before Straight and Tyrrell, JJ., who made the following order of reference to the Full Bench :—

"In this case the petitioner before us sued, *inter alia*, to recover from the defendants a sum of Rs. 49-11-6, being the amount due under a bond, which she alleged had been recovered on her account by Sheodin Ram, defendant, from the obligors of the bond. The Munsif before whom the case came, was of opinion that the determination of the plaintiff's right to the bond, in respect of which the said defendant had recovered the money claimed, involved the question of her heirship to the estate of Ganga Bishan, and there-

(1) I. L. R., 11 Calc. 6. (2) I. L. R., 7 All. 336.
(3) I. L. R., 3 All. 203.

fore the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value. He therefore returned the plaint for presentation to the proper Court, under s. 57 of the Code."

"The petition for revision before us takes up the position that the order of the Munsif, upheld by the Judge, is open to revision under s. 622 of the Code, by reason of the Munsif, in erroneously returning the plaint to be presented in a proper Court, having failed to exercise a jurisdiction vested in him by law, within the meaning of s. 622 of the Civil Procedure Code. We refer to the Full Bench the question whether, under the above circumstances, and with reference to the Privy Council case of *Amir Hasan Khan* v. *Sheo Bakhsh Singh* (1), the provisions of s. 622 are applicable."

Pandit *Sundar Lal*, for the petitioner.

Babu *Sital Prasad Chattarji*, for the opposite party.

PETHERAM, C. J.—I am of opinion that the question in this case must be answered in the affirmative. S. 20 of the Bengal Civil Courts Act enacts that the jurisdiction of the Munsif shall extend to suits in which the value of the subject-matter of the dispute does not exceed Rs. 1,000. The Munsif has held that he had no jurisdiction in this case, because the title to a larger sum than Rs. 1,000 was involved in the question whether the plaintiff was entitled to recover the sum of Rs. 49, for which alone the action was brought. I think that he was wrong in this view, as the only subject-matter in this suit was the Rs. 49, and that the Munsif consequently failed to exercise a jurisdiction vested in him, and that the record may be called for by this Court in revision. The section has been considered by the Privy Council in the case of *Amir Hasan* v. *Sheo Bakhsh Singh* (1), and the Full Bench of this Court in the case of *Magni Ram* v. *Jiwa Lal* (2), and the result of those cases in my opinion is that the questions to which s. 622 applies, are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s.

(1) I. L. R., 11 Calc. 6. (2) I. L. R., 7 All. 336.

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622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that when no appeal is provided, its decision on questions of both kinds is *final*.

STRAIGHT, J.—I desire, in the first place, to say that I concur in the view expressed by the learned Chief Justice as regards the particular case referred. In the second place, I accede to the interpretation he has placed on the ruling of their Lordships of the Privy Council; and the reason I do so is, because it is most undesirable that, upon a question of practice of this kind, there should be a difference of opinion. I therefore surrender my own views in deference to the rest of the Court. But while doing so, I desire to make a few observations, because I was the Judge who wrote the judgment in the original Full Bench decision of the Court on this subject in *Maulvi Muhammad* v. *Syed Husain* (1); and I am anxious briefly to repeat here the reasons upon which that judgment proceeded. As the section relating to this Court's powers of revision was originally drafted in Act X of 1877, it stood without the words in the present Code which have led to so much discussion; and there can be no doubt that at that time the jurisdiction of this Court depended purely on the question whether the Court below had improperly exercised its jurisdiction, or improperly refused to exercise it. In Act XII of 1879, amending Act X of 1877, the words "in the exercise of its jurisdiction illegally or with material irregularity" were introduced; and I presume that they were introduced with meaning and intention, and were intended to have some effect and operation. In order to ascertain what that meaning and intention was, it is necessary to look into the Code to see if it can be ascertained what was meant by the words "illegally" and "material irregularity." Now in s. 584, which specifies the grounds on which a second appeal lies to the High Court, I find what appears to me to supply a reasonable interpretation for these words. The section sets forth that no second appeal shall lie, except on the following grounds, namely,—"(*a*) the decision being contrary to some specified law or usage having the force of law; (*b*) the decision having failed to determine some material issue of law or usage having the force of law." Taking these two clauses together, they

(1) I. L. R., 3 All 203.

appear to me to embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Then, with reference to the words "material irregularity" in s. 622, cl (*c*) of s. 584 indicates their meaning thus:—"A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits" In other words, I construe the words "material irregularity" to mean some material irregularity in procedure "which may possibly have produced error or defect in the decision of the case upon the merits" As an illustration of my meaning I will put two cases. A Munsif who is seised of a suit below Rs. 500 in value, directs, in execution of the decree in the suit, that the tools of the judgment-debtor be sold. In such a case, an appeal would lie to the Judge; but there would be no second appeal to this Court. Here the Munsif makes an order which is contrary to law, because it is forbidden under s. 266 of the Code, and so he acts illegally. Again, a Munsif who has dismissed a suit *ex-parte* entertains an application under s. 108 of the Code; and, without notice to the other side, orders that the suit be replaced upon his file and tried. This action on his part is a material irregularity in procedure, because it contravenes the directions of s. 109 to the effect that no such order shall be made without notice to the other side. These two instances appear to me to be such as the "illegality" and "material irregularity" of s. 622 contemplate.

I need only add that, in my opinion, if there is one power which it is of the first importance that this Court should possess, it is the power of sending for the record in civil cases where no appeal lies. Experience shows that in a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below; and it is essential that in such cases the High Court should have the power of interference.

OLDFIELD, J.—I concur in the answer proposed by the learned Chief Justice.

BRODHURST, J.—I entirely concur in the conclusions arrived at by the learned Chief Justice with reference to the decision of

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the Privy Council in the case of *Amir Hasan Khan* v. *Sheo Bakhsh Singh* (1).

TYRRELL, J.—I concur in every word that has fallen from my brother Straight upon this matter.

1886 *February* 1.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KANJI MAL AND OTHERS (JUDGMENT-DEBTORS) *v* BIBI SAILO (DECREE-HOLDER).*

Execution of decree—Sale of immoveable property—Error in proclamation of sale as to incumbrance to which property was liable—Civil Procedure Code, ss. 311, 312.

In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree holder held two charges on the property, aggregating about Rs. 1,000. There was in fact one charge only, amounting to about Rs 800.

Held that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.

This was an appeal from an order of the Munsif of Moradabad City, dated the 7th September, 1885, refusing to set aside a sale of immoveable property in execution of a decree. The facts of the case are sufficiently stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellants (judgment-debtors).

Munshi *Hanuman Prasad* and Babu *Baroda Prasad Ghose*, for the respondent (decree-holder).

STRAIGHT and TYRRELL, JJ.—This is an appeal by a judgment-debtor, whose masonry house has been sold at auction and bought by the decree-holder for a sum of Rs. 552. Material irregularity in publishing and conducting the sale, with consequent depreciation in price, is alleged. We need not go into the question as to the conduct of the sale, whether it was held at the time notified or not. For we are of opinion that there was admittedly such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the

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* First Appeal No. 148 of 1885, from an order of Maulvi Muhammad Ezad Bakhsh, Munsif of Moradabad City, dated the 7th September, 1885.

(1) I. L. R., 11 Calc. 6.

fairness of the auction and affected the price. It was notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000; but, in fact, there was one charge only, and that about Rs. 800. Now this fact must have been known to the decree-holder who became the purchaser; and it is almost a necessary consequence that, assuming the house to be worth, as the Court below thought, Rs. 1,500, and it fetched Rs. 552 only, it would have commanded a higher price if the public had known, as the decree-holder did, that it was charged with Rs. 800 only.

We allow the appeal, set aside the sale, and direct that it be held anew, in the event of the decree not being in the meantime otherwise satisfied according to law.

The appellants will have the costs of this appeal.

Appeal allowed.

1886
February 1.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

GUDRI LAL AND ANOTHER (PLAINTIFFS) *v.* JAGANNATH RAM (DEFENDANT).*

Jurisdiction—Place of suing—Suit for sale of mortgaged property—Civil Procedure Code, ss. 16, 20.

In 1879 *R* gave *J* a bond containing a simple mortgage of immoveable property. Subsequently *R* and *P* jointly gave *D* a bond containing a simple mortgage of the same property. In 1881 *D* obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 *J* obtained a decree in the Court of the Munsif of *G*, (within the local limits of whose jurisdiction the property was not situated), for enforcement of his mortgage bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of *J's* decree, so far as it ordered the sale.

Held that *J's* decree could only be regarded as a simple money-decree, because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and neither the proviso to s. 16 nor s. 20 of the Code met the circumstances.

Held therefore that the plaintiffs were entitled in this suit to have it declared that *J's* decree was a simple money-decree only, on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiffs' possession from any part of it.

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* Second Appeal No. 211 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 17th November, 1884, affirming the decree of Maulvi Azizul Rahman, Munsif of Bansgaon, dated the 17th May, 1884.

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GUDRI LAL v. JAGANNATH RAM.

THE plaintiffs in this suit claimed the cancellation of a decree, dated the 9th September, 1882, in so far as it ordered the sale of a certain garden. It appeared that on the 4th April 1879, Ram Tahal, one of the defendants, gave one Jagannath Ram a bond containing a simple mortgage of a garden situated within the local limits of the Munsif of Bansgaon, in the Gorakhpur district, which belonged to Ram Tahal and his brother Prag Ram jointly, in equal moieties. On the 16th September, 1879, Ram Tahal and Prag Ram jointly gave one Durga Dayal a bond also containing a simple mortgage of the same garden. On the 10th May, 1881, Durga Dayal obtained a decree for the sale of the mortgaged property; and it was put up for sale, and was purchased by the plaintiffs in the present suit, sons of Durga Dayal. On the 9th September, 1882, Jagannath Ram having sued in the Court of the City Munsif of Gorakhpur, (within the local limits of whose jurisdiction the garden was not situated), to enforce his mortgage-bond, obtained a decree in that suit for, *inter alia*, the sale of the garden. The plaintiffs in this suit objected to the re-sale of the property; and their objections were disallowed. They then brought this suit against Jagannath, Ram Tahal, and Prag Ram in the Court of the Munsif of Bansgaon. Their claim was based on the ground, amongst others, that the decree of the City Munsif of Gorakhpur, so far as it ordered the sale of the property, was made without jurisdiction, the property not being situated within the local limits of his jurisdiction. The Court of first instance disallowed this contention, but gave the plaintiffs a decree in respect of Prag Ram's moiety of the property, on the ground that Ram Tahal was not competent to mortgage the same, dismissing the suit so far as the moiety of Ram Tahal was concerned. The plaintiffs appealed; and the lower appellate Court (Subordinate Judge of Gorakhpur) affirmed the decree of the first Court.

The plaintiffs in second appeal contended again that the decree of the City Munsif of Gorakhpur, so far as it ordered the sale of the property, was made without jurisdiction, and was therefore so far void.

Munshi *Kashi Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent (Jagannath Ram).

STRAIGHT and TYRRELL, JJ.—We are of opinion that the lower Courts have taken a wrong view in dismissing that part of the suit which relates to the share of Ram Tahal. The plaintiffs are the purchasers of the whole property at a sale in execution of a decree obtained by their father, Durga Dayal, against Ram Tahal and Prag, and their purchase took place on the 3rd January, 1884. No doubt at that time the defendant-respondent, Jagannath Ram, had a charge on the property by reason of the bond which was given him by Ram Tahal on the 4th April, 1879; and on the basis of this bond he had obtained a decree from the City Munsif of Gorakhpur on the 9th September, 1882. Now, of course, if the City Munsif of Gorakhpur had power to pass a decree on the basis of Jagannath Ram's bond, and so to enable Jagannath Ram to enforce the decree by selling Ram Tahal's share in the grove in Bansgaon, the plaintiffs could not maintain the present suit, because, not only was the charge of Jagannath Ram prior to their own, but a decree upon the bond had been obtained by him before the plaintiffs had purchased the whole grove. Unfortunately for the defendant-respondent, Jagannath Ram, his decree on the bond given by Ram Tahal in April, 1879, can only be regarded as a simple money-decree, because the City Munsif of Gorakhpur had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and that he was prohibited from doing so, is clear from the terms of s. 16 of the Civil Procedure Code. We do not think that the proviso to that section alters the position; and we dissent altogether from the remark of the Subordinate Judge, that s. 20 of the Civil Procedure Code meets the circumstances. Our conclusion accordingly is, that the plaintiffs are entitled in this suit to have it declared that the decree in favour of the defendant-respondent upon the bond given to him by Ram Tahal was only a simple money decree, and that, on the basis of that decree, no process in execution could issue in respect of the grove to oust the plaintiffs' possession from any part of it. Whether or not the respondent can institute proceedings in any Court for enforcement of his lien, we are not concerned to discuss. The appeal is decreed with costs, and the decrees of the lower Courts modified by decreeing the plaintiffs' claim with costs in all Courts.

Appeal allowed

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December 21.

APPELLATE CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

QUEEN-EMPRESS *v.* IMDAD KHAN.

Criminal breach of trust—Master and servant—Servant entrusted with moneys for payment to tradesman of account settled by master for a specific sum—Gratuity by tradesman to servant—Right of master to benefit of gratuity—Act XLV. of 1860 *(Penal Code), ss.* 405, 409*—Powers of Appellate Court to alter finding of Court of first instance—Criminal Procedure Code, s.* 423*—Accomplice—Evidence—Corroboration.*

Where a master entrusts his servant with money for the payment of an *open* account, *i.e.*, an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has *settled* the account with the tradesman for a specific sum, and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money. *Hay's Case* [In re *Canadian Oil Works Corporation* (1)] referred to.

Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding, under s. 423 of the Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried.

Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *Empress* v. *Ram Saran* (2) referred to.

THIS was an appeal from an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 19th January, 1885, convicting the appellant, under s. 409 of the Penal Code, upon two charges of criminal breach of trust as a public servant, and upon three other charges, under s. 50 of the Post-Office Act (XIV. of 1866), and sentencing him to three years' rigorous imprisonment upon each of the two charges first mentioned.

It appeared from the evidence for the prosecution that the appellant, Imdad Khan, was employed at Allahabad in the Railway Mail Service of the Government Postal Department as Examiner

(1) L. R., 10 Ch. App. 593. (2) Weekly Notes, 1885, p. 311.

and Superintendent of Stores. It was his duty to receive stores supplied by contractors, to see that the contractors supplied the proper quantity and quality of stores, and to despatch the stores to out-stations on indents. It was also his duty to keep an account of the expenditure in respect of such stores. It was also his duty to receive the monthly bills of the contractors, to check the bills, and to draw the amounts required for their settlement from Government, in contingent bills made out and signed by himself, and countersigned and passed by the Inspector-General of the Railway Mail Service. It was also his duty, having drawn these amounts, to remit them to the contractors.

Among the contractors supplying stores was a firm at Calcutta trading under the name of Tarni Charan Dat and Co. The contract between this firm and the Railway Mail Service was that the former should supply goods of a particular kind to the department for a period of two years, at prices specified in a schedule. Among the goods enumerated was a cloth called "*gazzi*," which was used in large quantities in the Postal Department. The scheduled price of this was Re. 1-12-6 per "*than*" or piece of eighteen yards. Up to January, 1881, *gazzi* was despatched by the firm from Calcutta. In that month the appellant returned fifty-four pieces as being of inferior quality. Shortly after this, it was arranged between the appellant and Tarni Charan Dat and Co. that instead of their supplying *gazzi* from Calcutta, he should purchase it at Allahabad, draw from Government at the rate of Re. 1-12-6 per *than*, pay for the *gazzi*, and remit to them their profit. The profit was first fixed at 9 pies per *than*, but was subsequently increased to 1 anna. Under this arrangement *gazzi* was supplied at Allahabad by one Sadhu Lal. The quantities of *gazzi* cloth supplied were communicated to Tarni Charan Dat and Co.; the firm forwarded invoices for such quantities; upon the receipt of these invoices in duplicate, one was signed and returned by the appellant and the other retained in his office; the firm, having received the signed invoices, sent in bills; these bills were attached as vouchers to the contingent bills sent by the appellant to the Inspector-General for countersignature; the countersigned bills were cashed by the appellant at the General Post Office at Allahabad; the contractors were ostensibly paid in full; and they gave receipts for the full amounts

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of their bills. In May, 1884, it was discovered by the department that the *gazzi* was supplied by Sadhu Lal, and that he was paid for it at the rate of Re. 1-6-0 per *than*.

The case for the prosecution was that the appellant had retained the difference between the actual price paid to Sadhu Lal for the *gazzi* and the profit which he remitted to Tarni Charan Dat and Co., and his conduct amounted to criminal breach of trust by a public servant, within the meaning of s. 409 of the Penal Code; and that, by sending to the firm remittance letters purporting to show that the whole of the sum specified in each was remitted, whereas a portion only was sent, he was guilty of incorrectly preparing documents with a fraudulent intention, within the meaning of s. 50 of the Post Office Act (XIV. of 1866). There was no allegation that the *gazzi* supplied by Sadhu Lal was, upon any occasion, inferior in quantity or in quality to that which Tarni Charan Dat and Co. were bound under their contract to supply.

The case for the defence was that although, in consequence of the arrangement made with Tarni Charan Dat and Co., *gazzi* was supplied to the Railway Mail Service stores by Sadhu Lal at Re. 1-6-0 a price, no part of the difference between that sum and the contract price of Re. 1-12-6 was retained by him, but the whole of such difference was transmitted regularly to the contractors.

The Sessions Judge of Allahabad, disagreeing with the assessors, was of opinion that the charges of criminal breach of trust and of incorrect preparation of documents with a fraudulent intention, were proved. He accordingly convicted the appellant upon those charges, and sentenced him, under s. 409 of the Penal Code, to six years' rigorous imprisonment, but considered a further sentence under s. 50 of the Post Office Act unnecessary.

The accused, Imdad Khan, appealed from the Sessions Judge's order to the High Court, in whose judgment the other material facts of the case are sufficiently stated.

Mr. *W. M. Colvin* (with him Mr. *Habib-ullah* and Mr. *Durga Charan*), for the appellant, contended that the evidence for the prosecution was insufficient to support the conviction. He further argued that, assuming the facts alleged by the prosecution to be proved, they did not constitute the offence of criminal breach of

trust as defined in s. 405 of the Penal Code. The definition of that offence involved a "dishonest" misappropriation or conversion to the use of the offender of property entrusted to him; but here the appellant did not act "dishonestly" according to the definition contained in s. 24 of the Code, inasmuch as he did not cause "wrongful loss." The Government never paid a higher price for *gazzi* cloth than they had contracted to pay, namely, Re. 1-12-6 a piece, and there was no evidence whatever to suggest that the cloth supplied was, upon any occasion, inferior either in quantity or in quality to that which Tarni Charan Dat and Co. had contracted to supply. This being so, the conviction and sentence under s. 409 of the Penal Code were bad, and should be set aside.

The *Public Prosecutor* (Mr. *C. H. Hill*), with him Babu *Ram Prasad*, for the Crown:—The evidence taken in the Court of Session establishes the facts alleged by the prosecution. [To show this, the *Public Prosecutor* referred to the evidence in detail.] These facts amount to the offence of criminal breach of trust, as defined in s. 405 of the Penal Code. A person to whom money is remitted for the purpose of payment to a third party, holds the money for the use of the remitter until, by some act done, or by some engagement with the person who is the object of the remittance, the agent has consented to appropriate it to his use: Addison *On the Law of Contracts*, 4th edition, p. 72. If the purpose fails for which the property is entrusted to the agent, he is under an obligation to return it to the remitter, and the property of the remitter is not divested until the object is performed: *Buchanan* v. *Findlay*, *per* Tenterden, C J. (1). *Toovey* v. *Milne* (2) also shows that where money is paid for a special purpose, and the purpose fails, the money remains the property of the person paying it. In the present case, the moneys remitted to the appellant always remained the property of Government, because the object of the remittance was never fulfilled. That object failed when Tarni Charan Dat and Co. agreed with the appellant to receive payment at a lower rate than was fixed by their contract, and thereupon the appellant, who had all along held the moneys for the use of Government, became bound to refund them. Not having done so, but having converted them to his own use, he

(1) 9 B. & Cr. 738, at p. 740. (2) 2 B. & Ald. 683.

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caused "wrongful loss" to Government and "wrongful gain" to himself, and so acted "dishonestly" within the meaning of s. 23, and committed criminal breach of trust within the meaning of s 405, of the Penal Code.

In *Harrington* v. *The Victoria Graving Dock Company* (1), it was laid down that "when a bribe is given, or a promise of a bribe is made to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one" and its tendency "must be to bias the mind of the agent, and lead him to act disloyally to his principal. . . . It is quite immaterial that the employer was not in fact damaged." The commission paid by Tarni Charan Dat and Co. to the appellant was a profit made by him in the course of his employment as agent, and Government was entitled to take the benefit of such profit, and the appellant committed criminal breach of trust in converting it to his own use.

[PETHERAM, C. J.—Where one man employs another for a particular purpose, as, for instance, to sell property, and the agent takes money from a person to whom that property is sold, it is clear that the money must be received for the employer's benefit. It is a profit made by the agent in the course of his employment. But where the customer gives a present to an agent who is not employed for the purpose of selling, is the master entitled to take the benefit of it?]

The reasoning of Cockburn, C. J., in *Harrington* v. *The Victoria Graving Dock Company* (1) appears to cover such a case.

[PETHERAM, C. J.—Suppose that a man employs another to buy a carriage for him, and the agent makes the purchase. Here, if the carriage builder gives the agent a present, the master is no doubt entitled to take it, because the effect of the transaction is to reduce the price. But suppose the master himself makes the bargain, and settles the price, and sends his servant to the builder with the money, and the builder gives the servant £ 5. How is the master entitled to that? The £ 5 is no doubt given in order

(1) L. R., 3 Q. B. D. 549.

that, when the carriage arrives, no fault shall be found with it. The benefit to the servant does not here spring out of a contract in which he is an agent.]

That case is not completely analogous to the present, for it supposes that the servant has actually handed over the money, and that the tradesman afterwards presents him with a *douceur*. Our case, on the other hand, is that the appellant appropriated the moneys entrusted to him while they were on their way from Government to the contractors. It is, however, immaterial whether the difference between the contract price and the actual price paid for the *gazzi* cloth was retained by the appellant, or whether he remitted the entire contract price to the contractors and received back from them the difference. In *Panama and South Pacific Telegraph Company* v *India Rubber, Gutta Percha, and Telegraph Works Company* (1), James, L. J., laid down the rule that "any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal," and entitles him to have the contract rescinded, and that "a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

[PETHERAM, C. J.—Does not the Lord Justice there mean by "agent" an agent for the purpose of making the contract?]

I submit that his meaning is wider, and that he lays down a general proposition applicable to all surreptitious transactions between an agent and the person with whom his principal is dealing. In Leake's *Digest of the Law of Contracts*, p 481, it is said:—"It seems that, although the payment to the agent be voluntary and made after the execution of the agency, it would be recoverable by his principal." In *Hays's Case* [In re *Canadian Oil Works Corporation* (2)], Mellish, L. J, said:—"There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency, beyond his proper remuneration as agent." Again, at p. 603, Mellish, L. J., gave the following illustration:—"A gentleman employs his servant to pay his tradesman's bills, and the servant goes to the tradesman and says, 'I have received

(1) L. R, 10 Ch. App. 515. (2) L. R., 10 Ch. App. 593.

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the money to pay your bill, but you must make me a present out of it.' The tradesman says, 'I am willing to make you a present.' Then a sum is deducted, the money is put down, and it is handed back. In a certain sense, no doubt, that sum of money will become the property of the servant. He could not be indicted for embezzlement, nor probably for putting it into his own pocket and using it; but there is no doubt that if an account was properly taken in any court of justice, he would be answerable for it, because it is perfectly obvious that if the creditor who received the payment is willing to make a deduction and discount from the sum he had received, that must be for the benefit of the master who is making the payment, and not for the benefit of the servant, who, without the consent of his master, has no right to receive any such profit." The reason why it is said that the servant could not be indicted for embezzlement is that, under the English statutes relating to that offence, it is an essential element of embezzlement that the property should be given to the offender for the use of the master, and, in the above case, the money was not paid to the servant for the master's use. This is not, however, an essential of criminal breach of trust as defined in s. 405 of the Penal Code; so that, in India, the conduct of the servant described in Mellish, L. J's illustration would be criminal breach of trust.

[PETHERAM, C. J.—Mellish, L. J., speaks of the tradesman as making a "deduction." This expression rather suggests that what the Lord Justice had in his mind was an open and not a settled account. It is arguable that there could be no "deduction" from an account previously agreed and settled between the master and the tradesman. If, for instance, the master sends his servant to pay a bill the total of which the master has not settled with the tradesman, and the items amount to £ 100, then if the agent and the tradesman make an arrangement by which ten per cent. is deducted from the total and £ 90 only are paid, and the servant, concealing the fact that a deduction has been made, appropriates the sum deducted, that is clearly embezzlement. But if the master has settled with the tradesman to pay £ 100, and the agent pays over the whole £ 100 according to his instructions, and the tradesman then gives him £ 10, surely that is a present to which the master has no claim.]

In *McKay's Case* (1), Mellish, L. J., referred to *Hay's Case* (2) and other authorities as showing that all the benefits which the agent of one party receives under such circumstances from the other must be treated as received for the benefit of his principal. "All the remuneration which an agent so receives he receives on behalf of his principal, and it does not matter whether it formed part of the original bargain, or was a present as remuneration for services." So too, in *Parker* v. *McKenna* (3), Lord Cairns, L. C., said:—"The rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. . . . . The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." James, L. J, said:—"It appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." See also *Robinson* v. *Mollet* (4), and in particular the observations of Mellor, J.

These authorities are sufficient to show that the conduct of the appellant amounted to criminal breach of trust by a public servant. In Archbold's *Pleading and Evidence in Criminal Cases*, 18th edition, p. 478, the nature of the evidence necessary to establish the commission of embezzlement is described. Thus, "the usual presumptive evidence" in such cases is said to be "that the defendant

(1) L. R, 2 Ch D. 1.
(2) L. R., 10 Ch. App. 593
(3) L. R., 10 Ch. App. 96.
(4) L. R., 7 H. L, 812.

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never accounted to his master for the money, &c., so received by him, or that he denied having received it." These conditions are satisfied in the present case. The appellant did not defend himself, as he might have done, by admitting the appropriation of the commission paid by the contractors, and setting up a claim of right to such appropriation. He met the charge by an absolute denial.

The fact that the contractors consented to the transaction does not affect the appellant's guilt. If they did not consent, his guilt would of course be obvious, for in that case no payment would be made, and Government would remain liable. But the agent cannot be absolved because the payee conspires with him to deprive the principal of his money.

In the next place, assuming that the acts of the appellant do not constitute the particular offence of which he has been convicted, this Court has power, under s. 423 of the Criminal Procedure, to alter the finding to a conviction for any offence which they do constitute, and at the same time maintain the sentence. If the facts do not establish the offence of criminal breach of trust, they establish the offence of cheating, under s. 415, and of cheating and dishonestly inducing a delivery of property, under s. 420 of the Penal Code. Or the finding may be altered to a conviction under s. 161 (public servant taking a gratification other than legal remuneration, in respect of an official act), or under s. 165 (public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant)

[PETHERAM, C. J.—Do you suggest that this Court may, in appeal, convict the appellant of an offence for which he was never charged or tried in the Court below, and in respect of which other evidence would have been necessary than that which was actually given?]

No. I confine myself to saying that, if this Court agrees with the Court below as to the facts, but is of opinion that the Court below has drawn an erroneous legal inference from them, or taken a wrong view as to the offence which they establish, it may, under s. 423, alter the finding so as to express their true legal effect.

[PETHERAM, C. J.—The appellant has never been charged or tried for the offences you mention. It appears to me that s. 423 only empowers an appellate Court to alter the finding within certain limits and upon a particular charge. For instance, there may be a finding of murder upon a charge on which there might have been a conviction for manslaughter; and in such a case the appellate Court may alter the finding from murder to manslaughter. Such a course would be proper only where both findings were equally consistent with the charge upon which the appellant was tried.]

I submit that the scope of s. 423 is wider. It will be observed that s. 227 of the Criminal Procedure Code empowers a Court to alter any charge at any time before judgment is pronounced, or, in trials before the Court of Session or High Court, before the verdict of the jury is returned, or the opinions of the assessors are expressed. It is only where the absence of a charge, or an error in the charge, can be shown to have prejudiced or misled the prisoner in his defence, that a Court of appeal or revision will interfere (s. 232). Cheating (s. 415 of the Penal Code), and cheating and dishonestly inducing a delivery of property (s. 420), are offences *ejusdem generis* with criminal breach of trust (ss. 405, 409), and hence the alteration of a finding from a conviction under the latter to a conviction under the former sections is clearly within the powers of the appellate Court. A conviction under s. 161 would also be proper.

[PETHERAM, C. J.—The difficulty there is that it is not clear what the appellant's powers precisely were. Before it can be proved what the gratification was intended to buy, we must know what he could have done in return for it.]

S. 165 is also applicable. The expression "valuable thing" used in that section includes money given not for any of the objects described in s. 161, but as "*dasturi*": *Queen-Empress* v. *Kampta* (1).

S. 236 of the Criminal Procedure Code provides that where the facts are such that it is doubtful which of several offences they constitute, the accused may be charged with having committed

(1) I. L. R., 1 All. 530.

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all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences. S. 237 provides that if, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, though he was not charged with it. Now, in the present case, the acts of the appellant were of such a nature that it is doubtful whether they constituted criminal breach of trust, or cheating, or taking an illegal gratification.

[PETHERAM, C. J.—These offences are, in the abstract, hardly *ejusdem generis*. Criminal breach of trust and accepting a bribe, for instance, are, popularly at all events, considered as unlike each other as any two crimes could be.]

Mr. *W. M. Colvin*, in reply.—The argument of the learned Public Prosecutor is that the appellant received from Tarni Charan Dat and Co. particular payments, that these payments represented profits made by him in the course of his employment as agent, that these profits were the property of his employers, and that, not having handed them over or accounted for them to Government, but having converted them to his own use, he acted dishonestly and was guilty of criminal breach of trust. My answer to this is that, assuming the appellant to have received the payments from Tarni Charan Dat and Co., he did not receive them in the course of his employment as agent. The agency was discharged *quoad* the particular transaction, as soon as payment to the contractors had been made, and any subsequent gift or commission to the appellant could not be described as profits made by him in the course of his employment, or in the matter of his agency. There was no *animus furandi* on the part of the appellant. The only authority directly in point which has been cited on behalf of the crown is a *dictum* of Mellish, L. J., in *Hay's Case* (1). That *dictum* must be read in connection with the particular circumstances of that case. It was an illustration

(1) L. R. 10 Ch. App 593.

used in a case where an agent had received moneys from persons desiring to sell certain property to his principals, and had been invested by his principals with large powers of altering and even rescinding the contract. In that case, the moneys were undoubtedly received by the agent in the course of his employment, and his position was distinctly antagonistic to that of his principals. There were, under the circumstances, good reasons for not allowing the agent to retain what had been paid to him. But in the present case the appellant had no power to alter the terms and conditions of the contract. Reading Mellish, L. J.'s illustration with the facts of the case in which it was used, it evidently was intended to apply to an open and not to a settled account, and it is therefore not applicable to the circumstances of the present case.

[PETHERAM, C. J. - You say that the rule applies only to cases where there is an account capable of reduction by the servant.]

Yes, because those are the only cases in which the acceptance of the gratuity puts the servant into a position antagonistic to the master. The principle of the cases which have been cited is that the acceptance of the gift operates as a reduction of the price, and that the master is entitled to the benefit of such reduction. It has no application to a case where the price, fixed and agreed between the master and the tradesman, has been fully paid by the servant, and the tradesman then makes him a present. In Mellish, L. J.'s illustration, there was no real payment to the tradesman, and the handing over of the money was a mere pretence.

The next question is whether the finding can now be altered to a conviction under some other section than s. 409 of the Penal Code. In the first place, s. 165 is not applicable. That section is confined to cases where a public servant obtains a valuable thing "without consideration or for a consideration which he knows to be inadequate." But in the present case there was ample consideration, for the appellant took upon himself nearly all Tarni Charan Dat's duties under the contract with Government.

[PETHERAM, C. J.—That was no consideration, because the appellant was already bound, as a Government servant, to give all his time to the service of Government. You need not, however, argue the question whether the finding should now be altered.]

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PETHERAM, C. J.—The accused Imdad Khan has been convicted upon two charges, framed under s. 409 of the Penal Code, of criminal breach of trust, and upon three charges framed under s. 50 of the Post Office Act (XIV. of 1866). The accusation against him under the last-mentioned section is, in substance, one of falsifying documents with the object of concealing or assisting towards the criminal breach of trust to which the other charges relate. So that, as the Sessions Judge has held, the charges all stand or fall together; and if the accused be found guilty under any one of them, he must also be found guilty under the others, though it is not necessary that there should be a separate sentence in respect of each. These being the matters charged, it is necessary, in the first place, to see what are the facts which are admitted, or, if not admitted, which have been established by the prosecution, and whether they constitute any offence; next, to ascertain what offence, if any, these facts, when taken together, constitute under the Penal Code.

The facts, as I gather them, are, that in the Post Office Service of these Provinces there is a department called the Railway Mail Service, and, as a part of this, there is at Allahabad a large storehouse, in which are kept the stores required for the use of that department. There is no evidence upon the record which shows by whom or upon whose authority such stores are ordered, or whose mind it is that decides from time to time what stores are required. It is, however, clear that the accused Imdad Khan had for some years held an office in the Railway Mail Service at Allahabad as "Examiner" and "Superintendent" of stores. How long he filled this office is not shown. It is necessary next to ascertain, so far as the evidence shows us, what his duties were. There is nothing on the record to suggest that he had any power of deciding what stores were required, or of giving any order for them. His duty was to supervise the stores when they came into stock, and to pass them as according to the sample, if they were of the quality they should be, and of the amount ordered and charged for. This was his business, so far as examination of the stores is concerned. Besides this it was his duty, after the goods had come into stock and had been passed, to check the accounts of the tradesmen supplying them, and, after checking them, to

forward in a lump all the tradesmen's bills which at that time were due—having first got them countersigned by his superior officer—to the person whose business it was to pay them. Then, having obtained the money to be paid to the group of tradesmen, it was his duty to distribute it among them.

The charge against Imdad Khan is that, having obtained moneys from Government for the purpose of paying a particular tradesman, who is said to have supplied goods to this store, he appropriated these moneys to his own use, and thereby committed the offence of criminal breach of trust.

We must therefore see how the evidence upon this charge stands. The case set up by the prosecution is as follows:—It is said that a particular firm at Calcutta, trading under the name of Tarni Charan Dat and Co. had made a contract with Government for the supply of certain stores. The precise terms of the contract are not before us, but, from the action of the parties, and from the heading of the memorandum, it appears that the contractor, Tarni Charan Dat, agreed to supply stores of a certain class, for a period of two years, at a price specified on a list or schedule of prices. I think it must be taken as proved that the contract between the parties was that Government, on the one hand, bound themselves for a period of two years to take these stores from the firm, and, on the other hand, the firm bound themselves for the same period to supply the stores at the rates agreed on. Among the articles enumerated in the schedule was a cloth called "*gazzi*," and the schedule price for this was Re. 1-12-6 a piece. The contractors therefore were under an obligation to supply Government with as much *gazzi* cloth as might be required at Re. 1-12-6 a piece, and the Government were under an obligation to take from the contractors all the *gazzi* cloth that was wanted, for two years, at the price stated.

The person whose business it was to give orders did order *gazzi* cloth from the Calcutta firm, and accordingly they sent the cloth to the storekeeper at Allahabad till January, 1881. A that time a certain quantity of *gazzi* cloth, which was sent to Allahabad by Tarni Charan Dat, and which came to the stores, was examined by Imdad Khan, and he rejected it as not corresponding

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with the sample kept in his office as a test piece. After this a different arrangement was made from that which had before prevailed It was agreed that, instead of the *gazzi* being sent to Allahabad from the contractors' own shop, it should be supplied to the stores by a trader in Allahabad in the Calcutta contractors' name, and it appears that in some way or other the directions to this trader to send in the cloth for the firm came through Imdad Khan. How they came, and how it was communicated to this person what quantity was required, is not clear; all that does appear is that, after the occasion in 1881 to which I have referred, the cloth was sent direct to the stores from the warehouse in Allahabad, in the name of the contractors in Calcutta, and that this was done in some way upon Imdad Khan's directions It is necessary to see, in the next place, how the price of the cloth was dealt with. When the goods were supplied to the stores by the Allahabad tradesman, the form of the accounts, so far as Government were concerned, was not altered. The amount of *gazzi* which was sent to the stores was charged for in the accounts sent by the Calcutta firm to Government, as if they had supplied them, just as before the change had been made, and the same price, Re. 1-12-6 a piece, was charged as Government were, under their contract to Tarni Charan Dat, bound to pay. So that, so far as concerned Government, there was no apparent change. The goods were still apparently sent by the Calcutta firm, and invoiced at the same prices as before; and Government continued to hand money to Imdad Khan to pay the tradesmen, and, among others, to pay Tarni Charan Dat, for *gazzi* cloth.

At length it came to the knowledge of the authorities that the price which the Allahabad house were getting for *gazzi* was Re 1-6 a piece, and that therefore the contractors were not getting the price which Government were paying, but six and a half annas a piece less. This discovery made them inquire who was pocketing the difference. Upon being questioned, Imded Khan stated it was true that, in consequence of an arrangement made with Tarni Charan Dat, the person supplying the goods got Re. 1-6; but that he, as storekeeper, who had to draw the Re 1-12-6 from Government, transmitted the whole of the price to the contractors.

This is the statement which he made at the outset of the inquiry, and to which he has ever since adhered.

The Government, however, were satisfied that the statement was not true. They made inquiries of the persons actually supplying the goods, and of the Calcutta contractors, and they came to the conclusion that, after Imdad Khan's rejection of the *gazzi* cloth in 1881, a new arrangement was made between Imdad Khan and the contractors alone, by which the former contract was practically abrogated; that after this the *gazzi* was no longer supplied by the Calcutta firm at Re. 1-12-6 a piece, but by some person at Allahabad on behalf of the Calcutta firm, or of Imdad Khan, at Re. 1-6 a piece only; and that the balance went into the pocket of Imdad Khan. In other words, it is alleged that, after the transaction in 1881, there was an agreement between the storekeeper and the contractors that the price of *gazzi* should be reduced from Re. 1-12-6 to Re. 1-6; that to conceal this reduction from the person who had to pay for the *gazzi*, the books and accounts were falsified; and that the resulting profit was appropriated by Imdad Khan, who, though drawing the larger price, paid only the smaller.

Now, it is obvious that if this state of facts has been proved, it amounts to the offence of criminal breach of trust. It is, by whatever technical name it may be called, a stealing of the difference between the two prices by a servant of Government, and a falsification of accounts with the object of concealing the crime. This is, in fact, the case which the prosecution contend is proved, and upon which they rely. To see whether they are justified in this, we must examine the evidence which they assert to be proof, and see if it can be relied on.

Bearing in mind the nature of the offence charged, it is clear that, if it has been committed at all, it has been committed by Imdad Khan and the tradesmen jointly. It was, in fact, a conspiracy, to which all of them were parties, and of which the object was to obtain the cloth at a reduced price, and to steal the difference for the benefit of all. This being so, it follows that the tradesmen are no less guilty than Imdad Khan. It is important to note this in considering whether the commission of the offence

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has been proved against Imdad Khan, who alone has been charged with it.

Now, if the facts are as I have just stated, the persons who must have been aware of the circumstances are Imdad Khan, Tarni Charan Dat. and the tradesman at Allahabad who supplied the cloth in Tarni Charan Dat's name. It is natural that when one of these persons is charged with criminal breach of trust, the others should be called as witnesses by the prosecution. And unless their evidence establishes the case against Imdad Khan, there is nothing upon the record that does.

The first of these witnesses that was called was a member of Tarni Charan Dat's firm. The contractors' story, if true, undoubtedly proves the case for the prosecution. They virtually say:—"We supplied these goods till 1881, and got for them a price of Re. 1-12-6 a piece. After the rejection of the goods in January, 1881, Imdad Khan said that he could get the stuff upon better terms at Allahabad; we replied, agreeing that he should do so upon any terms he pleased, and to carry on the accounts in such a way as to conceal the transaction, on condition of our receiving a share of the profit. We did not know who supplied the goods, or the price which he charged for them."

This statement, if true, proves the case of the prosecution, because it shows that the old arrangement was abrogated, that a new arrangement was made for the supply of *gazzi* cloth at a reduced price, and that the account books were falsified in order that this arrangement might be kept secret. It also implies that Tarni Charan Dat and Co. are equally guilty with Imdad Khan, and upon their own statement there is no reason why they should not be tried and convicted.

The next witness for the prosecution, of those implicated in the transaction, and who would naturally be aware of the circumstances, is Sadhu Lal, the tradesman at Allahabad, who supplied the goods after January, 1881. His evidence, however, absolutely contradicts that of Tarni Charan Dat. He virtually says:—"It is true that I supplied the cloth at Re. 1-6-0 a piece. But I did not supply it upon instructions given by Imdad Khan. I supplied it upon a contract with the Calcutta firm, and I sent it to the stores

in their name. I was the person who had the contract with Government before the Calcutta firm had it. Besides *gazzi* cloth there were other articles which I supplied to the stores under the same arrangement as I have described."

Here, then, we have the evidence of two persons who, according to one of them, are accomplices of Imdad Khan in the offence of criminal breach of trust. One of the three criminals is in the dock, and the other two are called as witnesses to prove the charge against him. One of them is not only an accomplice, but, if the case for the prosecution is true, must have falsified accounts in order to assist the accused. The other, if his statements are true, in effect, destroys that case. How is it possible that any Court could safely convict the prisoner upon such evidence and under such circumstances as these?

The only other matters relied on by the prosecution are the books of Tarni Charan Dat. These have been examined with the object of proving the untruth of Imdad Khan's statement that he handed over the whole price to the contractors, because they are said to show that the whole price was never received. But the books are evidence only to this extent—that, in giving his testimony, Tarni Charan Dat might look at them for the purpose of refreshing his memory. They cannot, however, carry his evidence any further, nor do they alter the fact that the state of things alleged by Tarni Charan Dat rests upon his evidence, and upon his evidence only, denied by the appellant, and contradicted on oath by Sadhu Lal.

We have therefore the common case in which the only evidence against an accused person is the evidence of his accomplice. It is not necessary for me to refer in detail to the numerous cases in which Judges of the greatest eminence and experience, both in this country and in England, have held that unless evidence of this kind is corroborated in material particulars, it cannot safely be relied on. The reasons upon which this opinion is based are various. It is plain that where a witness against an accused person tells a story which equally incriminates himself, there is no reason for preferring his story to the prisoner's. If the story of Tarni Charan Dat is true, then he and Imdad Khan are both of

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them rogues, and there is no ground for regarding either as more trustworthy than the other. By way of authority for this view, I need only refer to the judgment of my brother Straight in the case of *Empress* v. *Ram Saran* (1), in which the English cases are collected, and which fully explains the grounds upon which the highest authorities have decided that it is not safe to depend upon this class of evidence. It is enough for me to say that I entirely and absolutely agree with that judgment of my brother Straight, and with his opinions expressed thereon, which the authorities he refers to establish. For these reasons, I am of opinion that it would be unsafe to convict the appellant Imdad Khan upon evidence of this character, which is the only evidence against him, and I hold that he must be acquitted of the charges of criminal breach of trust.

Next, with reference to the charges of falsification of accounts, they stand or fall with the charges of criminal breach of trust. They are charges of the falsification of the accounts which were sent by Tarni Charan Dat, showing that the goods were being supplied under the original contract at the original prices, with the object of enabling the criminal breach of trust to be carried out. They are, in fact, substantially the same accusation, and depend upon the same evidence; and, for the reasons I have already given, I think that, upon these charges also, the accused must be acquitted.

I desire now to make a few observations upon the law of criminal breach of trust in cases of this nature, with reference to the reduction of the price of goods.

Mr. *Hill* has laid much stress upon a *dictum* of Lord Justice Mellish in *Hay's Case* [In re *The Canadian Oil Works Corporation* (2)]. It is to the effect that, if a master sends his servant to pay a bill, and gives him money for the payment, then if the tradesman makes the servant a present, the master is entitled to the benefit of it, because it amounts to a reduction of the price of the goods.

Now, if the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price

(1) Weekly Notes, 1885, p. 311. (2) L. R., 10 Ch. App. 593.

by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant after making the payment, asks the tradesman for a present, then, if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal: the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account.

In the present case, however, this question does not really arise. The case for the prosecution is, not that part of the price was *given back* to the accused, but that he actually stole it by reducing it in pursuance of a conspiracy. And as this case rests entirely upon the evidence of the accomplices who are said to have conspired with him, I think, as I have already said, that it cannot safely be regarded as proved.

I have been pressed by the learned Public Prosecutor to alter the findings, so as to convict Imdad Khan of some other offence under some other provision of the law For my part, I have serious doubts as to whether I could alter the finding in any case in such a manner. It is, however, enough for me to say that, in my opinion, such a course would not be right in the present case. If Imdad Khan is guilty of some other offence, he may be charged and tried for it. Upon this point I desire to express no opinion. All that I am concerned with is the offence for which he has been charged and tried; and I am of opinion that the evidence upon which he has been convicted is not such as can safely be relied on. Under these circumstances, I allow the appeal, and, setting aside the conviction and sentence, direct that the prisoner be released.

Conviction set aside.

1886
January 9.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

RAMTAHAL RAM AND ANOTHER (DEFENDANTS) *v.* RAMKISHAR RAM (PLAINTIFF) *

Suit, adjournment of hearing of—Ex-parte decree—"Appearance" of defendant—Civil Procedure Code, ss. 108, 157.

A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalat nama.* There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defence, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence and the Munsif decreed the claim.

Held that, under the circumstances stated, the defendants' pleader must be taken not to have been in court on the date fixed, for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable, and the decree was an *ex-parte* decision, which it was open to the Munsif to reconsider.

Hira Dai v *Hira Lal* (1) followed.

THE plaintiff in this suit claimed possession of certain immoveable property. The Court of first instance (Munsif of Saidpur) on the 17th August, 1883, gave him a decree. On the 20th September, 1883, the defendants applied, under s. 108 of the Civil Procedure Code, for an order setting aside this decree. On the 23rd November, 1883, the Court granted this application, and appointed the 7th December, 1883, for proceeding with the suit. On the last-mentioned date the Court tried the suit and dismissed it. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Ghâzipur) held that the decree first made by the Court of first instance was not an *ex-parte* decree, within the meaning of s. 108 of the Civil Procedure Code, and

* Second Appeal, No. 441 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghâzipur, dated the 6th March, 1885, reversing a decree of Muhammad Aziz-ul-Rahman, Munsif of Saidpur, dated the 7th December, 1883.

(1) I. L. R., 7 All., 539.

should not have been set aside under that section, and it restored that decree, reversing the second decree made by the Court of first instance.

In second appeal it was contended on behalf of the defendants that the decree first made by the Court of first instance was an *ex-parte* decree which could properly be set aside under s. 108 of the Civil Procedure Code.

The circumstances in which that decree was made are stated in the judgment of Petheram, C J.

Mr. *T. Conlan* and Lala *Juala Prasad*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

PETHERAM, C. J.—I am of opinion that this appeal must be allowed, and the Subordinate Judge directed to reinstate the case upon his file, and to dispose of it according to its merits. The material facts of the case are as follows:—The action was brought at the beginning of the year 1883 by the plaintiffs against the defendants to recover possession of certain property. A summons was issued to the five defendants, citing them to appear before the Munsif on the 30th April, 1883, the action then pending, but no one appeared on that day. Two of the defendants— whether before or after the 30th April is not clear— applied to the Munsif to postpone the case, and upon this application the Munsif fixed the 15th May for the disposal of the suit, and the defendants were directed to file written statements before the 7th of the month. No written statements, however, were filed, and on the 15th May the plaintiffs appeared before the Munsif, and of the five defendants only two appeared and asked for further time to be allowed. This was granted and a date fixed, but when that day arrived and the matter again came before the Munsif, apparently no one appeared, and the Court passed a decree for the plaintiffs *ex-parte*. On the 8th June, the two principal defendants applied to the Munsif, under s. 108 of the Civil Procedure Code, on the ground that the decree against them had been passed *ex-parte*, and prayed that it might be set aside. This application was granted, and the Munsif reinstated the case upon his file, and fixed the 17th August for its disposal. I understand that the issues had been

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settled. and on the 17th August what the Munsif had to do was to try the case. The questions in issue were questions of fact, so that it would be necessary to take evidence. When the 17th August arrived, the plaintiffs appeared. The defendants did not appear, but there was in court a pleader, who had been instructed by the two principal defendants at the beginning of the case, and who had filed a *vakalat-nama* in pursuance of the statute. But so far as I can ascertain, when the case came before the Court on the 17th August, the pleader had only his original instructions to enter an appearance and file his *vakalat-nama*. He had no instructions as to the facts of the case or as to evidence to be adduced, nor was he provided with any of the means of conducting the defence. Under these circumstances the plaintiffs gave their evidence, and a decree was passed in their favour in the defendants' absence.

The question now arises whether this was an *ex-parte* decree which the Munsif could reconsider under s. 108 of the Civil Procedure Code; or whether, on the other hand, it was a decree of such a nature that it could only be dealt with by appeal. The determination of this point depends upon the further question whether the defendants, on the 17th August, 1883, did "appear" within the meaning of s. 157 of the Civil Procedure Code.

Now this Court, in the case of *Hira Dai* v. *Hira Lal* (1), has decided that the mere fact of instructing a pleader who has filed his *vakalat-nama* is not by itself sufficient to prevent a defendant from failing to make an appearance. We are bound by that ruling, and I entertain no doubt whatever of its propriety, and am prepared to follow it.

There is nothing on the record to show that anything was done by the defendants beyond the instructions to the pleader at the outset to defend the suit; and this being so, I am of opinion that the pleader must be held not to have been present in court on the 17th August, 1883, for the purpose of defending the suit on behalf of the defendants, because, as regards that part of the case, he had not been instructed, and therefore it is a fair inference that the defendants did not appear, and that the suit was disposed of under s. 157 of the Code. Under these circumstances the provisions of

(1) I. L. R., 7 All. 538.

s. 108 were applicable, and it was open to the Munsif to reconsider his decision; and the Judge, instead of interfering with the Munsif's discretion, ought to have disposed of the appeal upon its merits, and not upon a technical point. For these reasons I am of opinion that the appeal should be allowed, and the Judge directed to reinstate the appeal upon his file, and to dispose of it according to the merits. Costs will be costs in the cause.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1886 *January* 15.

LACHMAN KUAR (PLAINTIFF) v. MARDAN SINGH AND OTHERS (DEFENDANTS).*

Hindu widow—Re-marriage—Presumption of legality of marriage—Act XV of 1856

L sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court, on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate.

Held that, the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and, looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, *i.e.*, until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited.

THE plaintiff in this suit claimed possession of a share in a certain village, as widow and heiress of one Aman Singh, a Hindu governed by the law of the Mitakshara, whom she alleged to have been at the time of his death separate from the other members of his family. The defendants were cousins of Aman Singh, and after his death had obtained an order in the Revenue Court, directing their names to be recorded in his place in respect of the share in suit. They contended that Aman Singh had lived jointly

* Second Appeal No 467 of 1885, from a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 5th February, 1885, reversing a decree of Babu Jai Lal, Munsif of Akbarpur, dated the 16th August, 1884.

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with them; that the plaintiff was not his wife but his mistress and that she, having been excommunicated from the brotherhood on account of immorality, had no right of inheritance, under the Hindu Law, to the estate of Aman Singh. It appeared that the plaintiff was originally the wife of Achhru Singh, a cousin of Aman Singh, and had lived with the latter after the death of the former. The caste of the family was. The family were Gaur Rajputs (Kshatriya.)

The Court of first instance (Munsif of Akbarpur) found that, according to the custom of the caste to which the parties belonged, the plaintiff, having been kept by Aman Singh as his wife, must be regarded as having been lawfully married to him. The Court also found that the allegation of the defendants, to the effect that Aman Singh had lived jointly with them, and as to the immorality of the plaintiff, were groundless. It accordingly decreed the claim. On appeal, the Subordinate Judge of Cawnpore reversed the Munsif's decree and dismissed the suit, observing as follows:—"This Court, differing from the opinion of the first Court, holds that as Aman Singh was a Thakur Kshatriya by caste, and the plaintiff was the widow of the elder brother, she cannot be said to be a lawfully-married wife by reason of her being a concubine, and hence cannot be entitled to the inheritance of Aman Singh. There are three superior tribes among Hindus. Among them one is Kshatriya, and in such castes the marriage with a widow has never been held to be valid. If any widow lives in the keeping of any relation of her husband, she can never be considered to be the lawfully-married wife of that person."

In second appeal by the plaintiff, it was contended on her behalf, first, that the Subordinate Judge was in error in holding that the marriage of a widow with a relative of her deceased husband was illegal; and, secondly, that the existence of such a custom of marriage in the caste to which the parties in the case belonged, had been established by the evidence.

Munshi *Kashi Prasad*, for the appellant.

Babu *Dwarka Nath Banarji*, for the respondents.

STRAIGHT and BRODHURST, JJ.—We both feel that what professes to be the judgment of the Subordinate Judge in appeal is a

most inadequate and unsatisfactory production, and that it is not proper for us, upon the basis of it, to determine a question of such vital importance to the plaintiff and her two children as is involved in the present suit. She claimed upon the basis of her being the widow of one Aman Singh, deceased, and the mother of his two infant daughters, to have her right declared as his widow to possession of the property in suit; the effect of which declaration, if granted, would have been that the two infant daughters, if they survived her, would, on her death, succeed to the share; assuming always that the allegation made by the defendants that they were joint with Aman Singh was not made out. The plaintiff seems, in the first Court, to have given evidence to show that she was married to Aman Singh, and that her two infant daughters were the offspring of that marriage. Under these circumstances, and looking to the provisions of Act XV of 1856, we are inclined to think that the presumption was in favour of the legality of such marriage, until the contrary was shown, that is, as in the present case, until the defendants has established that, according to the custom of the caste of Gaur Rajputs, to which Achhru and Aman Singh belonged, the marriage of a cousin with his deceased cousin's widow is prohibited. With these remarks, and without repeating what we have already said as to the character of the decision of the Subordinate Judge appealed from, we think that the appeal was not in reality tried at all by that officer, for he entirely failed to grasp the legal points involved in the case, or to record a decision with which, looking to the real questions raised between the parties, it is possible for us to deal as a Court of appeal. The only proper course appears to us to decree the appeal, and set aside the judgment and decree of the lower appellate Court.

We remand the case to the present Subordinate Judge of Cawnpore, for restoration of the appeal to his file and for trial *de novo* on the merits in advertence to our remarks as to Act XV of 1856, and with due regard to the pleas taken in the memorandum of appeal to the lower appellate Court. The costs of this appeal and the other costs hitherto incurred in the litigation will be costs in the cause.

Appeal allowed.

1886
January 21.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BASTI RAM (DEFENDANT) *v.* FATTU (PLAINTIFF).*

Civil Procedure Code, s. 244—Question for Court executing decree—Separate suit—Civil Procedure Code, ss. 266, 316.

The provisions of s. 244 (*c*) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor, whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII. of 1881 (N.-W. P. Rent Act).

Held by the Full Bench that the question involved in the suit was one of the nature referred to in s. 244 (*c*) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was therefore not maintainable. *Narain* v. *Parun* (1) referred to.

THE defendant in this suit held a decree for money against the plaintiff.. In execution of that decree he caused to be attached and advertised for sale the plaintiff's right of occupancy in certain lands. The plaintiff objected to the attachment on the ground that the sale in execution of decree of such a right was prohibited by s. 9 of Act XII. of 1881 (N.-W. P. Rent Act). The Court executing the decree disallowed this objection on the 9th August, 1883, and the tenure was put up for sale, and purchased by the defendant on the 20th August, 1883; and possession of the lands was delivered to him.

The plaintiff brought this suit against the defendant to set aside the order disallowing his objection and the sale, and to recover possession of the land, on the ground that the sale was illegal and void, being in contravention of the provisions of s. 9 of the Rent Act. The Court of first instance (Munsif of Muzaffarnagar) gave the plaintiff a decree as claimed. The defendant appealed on

* Second Appeal No. 1482 of 1884, from a decree of C W. P Watts, Esq, District Judge of Saháranpur, dated the 23rd July, 1884, affirming a decree of Kuar Mohan Lal, Munsif of Muzaffarnagar, dated the 23rd April, 1884.

(1) Weekly Notes, 1883, p. 218.

certain grounds. At the hearing of the appeal he urged, in addition to those grounds, the ground that s. 244 of the Code of Civil Procedure was a bar to the suit. This ground the lower appellate Court refused to consider, as it was a new one and had not been taken below, and affirmed the decree of the first Court.

The defendant, in second appeal, again contended that the suit was barred by s 244 of the Civil Procedure Code.

With reference to this contention, the Court (Petheram, C. J, and Tyrrell, J.) referred the following question to the Full Bench : -

"Is a suit brought by a *quondam* judgment-debtor against the purchaser of his occupancy-tenure, who was also his decree-holder, barred by the rule in s. 244 (*c*) of the Civil Procedure Code?"

Munshi *Kashi Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

OLDFIELD, J. (PETHERAM, C. J, and STRAIGHT, BRODHURST, and TYRRELL, JJ, concurring).—By s. 244, Civil Procedure Code, it is provided that certain questions shall be determined by order of the Court executing the decree, and not by separate suit. Amongst these are all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree.

The questions must be questions which arise between parties to the suit or their representatives, and which relate to the execution, discharge, or satisfaction of the decree.

If they are questions of this nature, and which properly arise between the parties or their representatives, they must be determined by order of the Court executing the decree, and not by separate suit; and the provision disallowing a separate suit to determine these questions applies not only to prohibit a suit between parties and their representatives, but also a suit by a party or his representatives against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

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If the question be of this nature, it is one which by s 244 must be determined by order of the Court executing the decree, and not by separate suit ; and it is immaterial whether the party did or did not raise it prior to the auction-sale at the time of execution If he did not, he lost the remedy which the Legislature has provided.

That this was the intention of the Legislature, and that a question of this kind cannot be raised by a party to the suit in which the decree was passed against a purchaser in execution of that decree seems evident from s. 316, which provides that, as far regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of the sale-certificate.

In the case before us a judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree, on the ground that the property, which is a tenant's right in land, is not by law saleable in execution of a decree. This question is one which arose between the plaintiff-judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale; and it is a question which must be considered to relate to the execution, discharge, or satisfaction of the decree. It is, in effect, whether certain property was liable to attachment and sale to satisfy the decree.

Certain things are, by s. 266, Civil Procedure Code, not liable to attachment and sale ; and questions regarding liability to attachment and sale arising out of the provisions of s. 266 would clearly be questions within the meaning of s. 244, Civil Procedure Code. The question of the liability of the property, the subject of this suit, to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under s. 266, Civil Procedure Code, it is one which falls within the meaning of s. 244, Civil Procedure Code.

For these reasons I am of opinion that the suit is not maintainable, and on re-consideration I modify the opinion I expressed in the case of *Narain* v. *Puran* (1).

(1) Weekly Notes, 1883, p 218.

Before Sir Comer Petheram, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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ABDUL KADIR (PLAINTIFF) *v.* SALIMA AND ANOTHER (DEFENDANTS).

Suit for restitution of conjugal rights—Muhammadan Law—Dower—Plea of non-payment—Form of decree.

According to the Muhammadan Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim.

It is a general rule of interpretation of the Muhammadan Law that, in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight.

Moonshee Buzloor Ruheem v. *Shums-oon-nissa Begum* (1), *Mulleeka* v. *Jumeela* (2), *Ranee Khajooroonissa* v. *Ranee Ryeesoonissa* (3), *Nawab Bahadoor Jung Khan* v.

* Second Appeal No. 414 of 1884, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 15th March, 1884, reversing a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 12th December, 1883.

(1) 11 Moo. I. A. 551.
(2) L. R., Sup. Vol., Ind. Ap. 135; 11 B. L. R., 375.
(3) L. R., 2 Ind. Ap. 235; 5 B. L. R., 84.

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Uzeez Begum (1), *Jaun Beebee* v *Sheikh Moonshee Beparee* (2), *Gatha Ram Mistree* v. *Moohita Kochin Atteah Doomoonee* (3), and *Eidan* v. *Mazhar Husain* (4), referred to. *Sheikh Abdool Shukkour* v. *Rahem-oon-nissa* (5), *Wilayat Husain* v. *Allah Rakhi* (6), *Nasrat Husain* v. *Hamidan* (7), and *Nasir Khan* v. *Umrao* (8), overruled.

In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi Law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan Law.

Held by the Full Bench that the lower appellate Court's view of the Muhammadan Law relating to conjugal rights and the husband's obligation to pay dower, was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit.

THE plaintiff in this suit claimed restitution of conjugal rights. The parties to the suit were Sunni Muhammadans governed by the Hanáfi law. The plaintiff was married to the defendant Salima on the 15th March, 1883, and her dower was fixed without any specification as to whether it was to be partly or wholly prompt or deferred. She cohabited with her husband, the plaintiff, up to the 15th June, 1883, when she went on a visit to her father, the defendant Chimman. On the 28th June, 1883, the plaintiff instituted the present suit on the allegation that he requested Chimman to allow Salima to return to cohabitation with him, but that Chimman "flatly refused to comply with the plaintiff's request, and obstructed him in bringing the defendant Salima with him;" that the defendant Salima had "been won over by the defendant Chimman to his own side;" and that the plaintiff's wife, the defendant Salima, was "not therefore willing to come with the plaintiff". Upon these allegations the plaintiff prayed that "the defendant

(1) N.-W. P. S D.A. Rep., 1843-46, p 180
(2) 3 W. R, C. R, 93
(3) 14 B. L. R. 293.
(4) I. L R., 1 All. 483.
(5) N.-W. P. H C. Rep., 1874, p. 94.
(6) I. L R, 2 All. 831.
(7) I. L R., 4 All. 205.
(8) Weekly Notes, 1882, p 96.

Chimman be ordered to send the defendant Salima with the plaintiff, and not to interfere with the latter in bringing her with him, and the defendant Salima be also ordered to come with the plaintiff and live with him as his wife."

To the suit so instituted two separate defences were made on one and the same day, the 24th July, 1883.

The defendant Chimman simply protested against being impleaded in the suit, stating that he "never refused to send Salima to her husband's house;" that she was "herself wise and major," and could "form a judgment as to her own interests."

The defendant Salima raised three main pleas in defence:—*First*, that she had been irrevocably divorced by the plaintiff, and was therefore no longer his wife; *secondly*, that "notwithstanding the divorce, the plaintiff had not paid the defendant's dower," so that, "even if the plaintiff had not repudiated the defendant, he was not competent to bring his suit so long as he did not satisfy her dower-debt;" and *thirdly*, that the plaintiff had treated her with cruelty, and she was therefore in fear of grave personal injury.

In this stage of the case the plaintiff deposited the whole dower-money in Court on the 20th August, 1883; and the Court of first instance (Munsif of Mirzapur) having examined the evidence produced on either side, held that the allegations set up in defence were not proved; that the nature of dower not having been "specified at the time of marriage, only a part of the dower becomes, under the Muhammadan law, payable on demand;" that "before the institution of the suit, the dower was never demanded by the defendant;" that "the defendant having insisted on payment of the dower, the plaintiff has paid the money into Court;" and that such payment under the circumstances of the case entitled the plaintiff "to succeed in his claim for bringing his wife to his house."

Upon appeal by both the defendants, the lower appellate Court (District Judge of Mirzapur), relying upon certain rulings, and without going into the merits of the case as to the pleas regarding divorce and cruelty, held that "the whole of the dower is to be considered as prompt" under the Muhammadan law, and that "payment into Court after institution of the suit was insufficient, because the husband had no cause of action at the time when he

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brought his suit." Upon this ground the District Judge, decreeing the appeal, dismissed the suit *in toto*.

The plaintiff appealed to the High Court, impugning the view of the Muhammadan law taken by the lower appellate Court.

The appeal came on for hearing before Oldfield and Mahmood, JJ., who, having regard to the rulings of the Court in *Sheikh Abdool Shukkoar* v. *Raheem-un-nissa* (1), *Wilayat Husain* v. *Allah Rakhi* (2), and *Nazir Khan* v. *Umrao* (3), referred to the Full Bench the question "whether, under the circumstances of this case, the plaintiff had the right to maintain the suit."

Mr. *Amir-ud-din*, for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

PETHERAM, C. J. (STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ., concurring):—This case was argued before the Full Bench on the 26th March, 1885, when the Judges constituting the Court were the same as now, except that Mr. Justice Mahmood was officiating for Mr. Justice Tyrrell. Mr. Justice Mahmood has now left the Court, but we have had the advantage of his written opinion, which we adopt and deliver as the judgment of the Court. His opinion answers the question referred to the Full Bench in the affirmative, as follows:—

MAHMOOD, J.—The question raised by this reference is one not free from difficulty, arising partly from the manner in which the subject has been dealt with in the text-books of Muhammadan law, and partly from the *ratio decidendi* adopted in some of the reported cases which I shall presently refer to and discuss. But before doing so, I consider it necessary to recapitulate the facts of this case, so far as they are required for the purposes of answering this reference.

(After stating the facts as stated above, the learned Judge continued as follows:) The plaintiff has preferred this second appeal impugning the view of the Muhammadan law taken by the lower appellate Court, and the question raised by the contention of the parties is one the decision of which will affect the domestic family life of the Muhammadan community. It therefore

(1) N.-W. P. H. C. Rep., 1874, p. 94. (2) I. L. R., 2 All. 831.
(3) Weekly Notes, 1882, p. 96.

falls essentially within the purview of s. 24 of the Bengal Civil Courts Act (VI of 1871), which binds us to adhere to the rules of Muhammadan law in determining such questions. The clause is a reproduction of s. 15, Bengal Regulation IV of 1793. Referring to that clause, the Lords of the Privy Council, in *Moonshee Buzloor Ruheem* v. *Shums-oon-nissa Begum* (1), which was a suit for restitution of conjugal rights by a Muhammadan against his wife, made certain observations which furnish the guiding principle upon which such cases should be determined. After quoting certain passages from the judgment of the learned Judges of the Calcutta High Court, their Lordships went on to say :—"The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Muhammadan law, but according to what is termed 'equity and good conscience,' *i.e.*, according to that which the Judge may think the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, ... and they can conceive nothing more likely to give just alarm to the Muhammadan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Muhammadan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair, without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband" (pp. 614-615).

I have quoted the passage at such length, because it has come within my notice that vague and variable notions of the rule of "justice, equity and good conscience" are sometimes regarded as affecting the administration of native laws in such matters to a

(1) 11 Moo. I. A., 551.

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degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion: and applying the observations of the Lords of the Privy Council to the present case, I have no doubt that this case must be decided according to the rules of Muhammadan law, the order of the Court, whatever it may be, being, of course, subject to such rules as the exigencies of the general municipal law may require.

In this view of the case the reference cannot, in my opinion, be satisfactorily answered without considering, *first*, the exact nature and effect of marriage under the Muhammadan law upon the contracting parties; *secondly*, the exact nature of the liability of the husband to pay the dower; *thirdly*, the matrimonial rights of the parties as to conjugal cohabitation; and *fourthly*, the rules of the general law as to the decree of Court in such cases.

But, as preliminary to the consideration of these various points, I may observe that a suit for restitution of conjugal rights is a suit "of a civil nature," within the meaning of s. 11 of the Civil Procedure Code, and this view is supported by the terms of articles 34 and 35, sch. ii, Limitation Act (XV of 1877), and the provisions of s. 260 of the Code itself. To quote the language of the Privy Council in the case already referred to, "upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Muhammadan law" (p. 610).

What, then, are the rules of the Muhammadan law upon the first three points which I have already enumerated? I will deal with each of those points separately, and in doing so will refer to the important rulings which constitute the case law upon the subject.

In dealing with the first point, I adopt the language employed in the Tagore Law Lectures (1873) in saying that "marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not posi-

tively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case" (p. 291). That this is an accurate summary of the Muhammadan law is shown by the best authorities, and Mr. Baillie, at page 4 of his Digest, relying upon the texts of the *Kanz*, the *Kifayah*, and the *Inayah*, has well summarized the law :—" Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts, are *Eejab-o-kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance." The Hedaya lays down the same rule as to the constitution of the marriage contract, and Mr. Hamilton has rightly translated the original text (1) :— " Marriage is contracted —that is to say, is effected and legally confirmed—by means of declaration and consent, both expressed in the preterite." These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law. I have said enough as to the *nature* of the contract of marriage, and in describing its necessary legal effects I cannot do better than resort to the original text of the *Futawa-i-Alamgiri* which Mr. Bailie has translated, in the form of paraphrase, at page 13 of his Digest,

(1) النكاح ينعقد بالايجاب والقبول بلفظين يعبربهما عن الماضي (هدايه كتاب النكاح) *

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but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible:—"The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category (1)", (with reference to prohibitions of the marriage law).

That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law cannot, in my opinion, be doubted; and even regarding the power of correction, the English law seems to resemble the Muhammadan, for even under the former "the old authorities say the husband may beat his wife;" and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the Lords of the Privy Council in the case already cited:—"The Muhammadan law, on a question of what is legal cruelty between

(1) اما احكامه فحل استمتاع كل منهما بالآخر على الوجه الماذون فيه شرعاً كذا في فتح القدير و ملك التحبس وهي صيرورتها ممنوعة عن الخروج والبروز و وجوب المهر والنفقة اوالكسوة عليه و حرمة المصاهرة والارث من الجانبين و وجوب العدل بين النساء و حقوقهن و وجوب اطاعته عليها اذا ادعاها الى الفراش و ولاية تاديبها اذا لم تطعه بان نشزت و استحباب معاشرتها بالمعروف هكذا في البحر الرايق و تحريم الجمع بين الاختين و من في معناهما كذا في السراج الوهاج (عالمگيري كتاب النكاح) *

man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:— 'There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell said, in *Evans* v. *Evans*, 'has never been driven off this ground'" (pp. 611-612).

Now the legal effects of marriage, as enumerated in the *Fatawa-i-Alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife.—

This leads me to the consideration of the second point, upon which the greatest stress has been laid in the argument at the bar. It was contended by the learned pleader for the respondent that, under the Muhammadan law, the wife's dower is regarded as nothing more or less than price for connubial intercourse, and that the right of cohabitation does not therefore accrue to the husband till he has paid the dower to the wife. The argument, so urged, renders it convenient to deal with the third point along with the second.

I have already shown that, under the Muhammadan law, the right of cohabitation comes into existence at the same time and by reason of the same incident of law as the right of dower. That the latter right may modify and affect the former cannot be doubted: how it affects and modifies it is the main subject of this reference. Dower, under the Muhammadan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were

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to engage in the contract on the special condition that there should be no dower."—(Hamilton's Hedaya by Grady, p. 44). Even after the marriage the amount of dower may be increased by the husband during coverture (Baillie's Digest, p. 111); and indeed in this, as in some other respects, the dower of the Muhammadan law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the Law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole dower is presumed to be prompt and due on demand [*Mirza Bedar Bukht Mahomed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor* (1)] The question when such dower becomes payable was discussed by the Lords of the Privy Council in *Mulleeka* v. *Jumeela* (2) and in *Ranee Khajooroonissa* v. *Ranee Ryeesoonissa* (3) and in the former of these cases their Lordships approved the rule laid down by the Sadr Diwani Adalat of these provinces in *Nawab*

(1) 2 Suth. P. C. J. 823. (2) L. R., Sup. Vol., Ind. Ap. 135; 11 B. L. R. 375.
(3) L. R., 2 Ind. Ap. 235; 5 B. L. R., 84.

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Buhadoor Jung Khan v. *Uzeez Begum* (1), wherein the Court considered "the nature of the exigible dower to be that of a debt payable generally on demand after the date of the contract, which forms the basis of the obligations, and payable at any period during the life of the husband, on which that demand shall be actually made, and therefore until the demand be actually made and refused, the ground of an action at law cannot properly be said to have arisen" These rulings leave no doubt that although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture, and that it is only upon making such demand that it becomes payable in the sense of performance being rendered in fulfilment of an obligation.

The right of dower confers another right upon the Muhammadan wife, and the nature of this second right is described in the Hedaya in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's Hedaya, at page 54; but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage:—"It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself); and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abu Yusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abu Hanifa: but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists

(1) N.-W. P. S. D. A. Rep., 1843-46, p. 180.

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where there is retirement with her consent; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors (1)."

Another passage to be found in the *Durrul Mukhtar* has also been cited by the learned pleader for the respondent, and I translate it here before considering the exact effect of these authorities upon the present case:—

"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly (2)."

Relying upon these passages, the learned pleader for the respondents contends that the right of cohabitation does not accrue to the husband at all until he has paid the prompt dower, and that, inasmuch as the plaintiff in the present case had not paid the dower to his wife, defendant No. 2, her refusal to cohabit with him did not afford a cause of action for a suit for restitution of conjugal rights. In support of this contention certain reported cases have been cited, which I wish to notice here. In *Sheikh Abdool Shukkoar*

(1) للمراة ان تمنع نفسها حتى تاخذ المهر و تمنعه ان يخرجها اى يسافر بها ليتعين حقها في البدل كما تعين حق الزوج في المبدل وصار كالبيع و ليس للزوج ان يمنعها من السفر والخروج من منزله و زيارت اهلها حتى يوفيها المهر كله اى المعجل لان حق الحبس لاستيفاء المستحق و ليس له حق الاستيفاء قبل الايفاء و لوكان المهر كله مؤجلاً ليس لها ان تمنع نفسها لاسقاطها حقها بالتاجيل كما في البيع و فيه خلاف ابي يوسف رح وان دخل بها فكذلك الجواب عند ابي حنيفه رح و قالا ليس لها ان تمنع نفسها والخلاف فيما اذا كان الدخول برضاها حتى لوكانت مكرهة اوكانت صبية او مجنونة لايسقط حقها في الحبس بالاتفاق (هدايه كتاب النكاح) *

(2) لها منعه من الوطي و دواعيه شرح مجمع السفر بها و لو بعد وطى او خلوة رضيتهما لان كل وطئة معقود عليها فتسليم البعض لا يوجب تسليم الباقي لاخذ مابين تعجيله من المهر كلاً او بعضاً (درالمختار باب المهر) *

v. *Raheem-oon-nissa* (1) it was held that a suit will not lie by a Muhammadan to enforce the return of his wife to his house, even after consummation with consent, until her prompt dower has been paid. The rule was followed to its fullest extent in *Wilayat Husain* v. *Allah Rakhi* (2) and in *Nasrat Husain* v. *Hamidan* (3), and in the former of these cases it was held that a Muhammadan cannot maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt and has not been paid. In *Eidan* v. *Mazhar Husain* (4), where the suit prayed for restitution of conjugal rights, and the defendant in her written statement having claimed dower, the lower appellate Court, setting aside the decree of the first Court, decreed the claim conditional upon payment of prompt dower, this Court upheld the decree by a judgment which is silent upon the specific question whether the dower not having been paid before suit, the plaintiff had the right to come into Court with such a prayer. In *Nazir Khan* v. *Umrao* (5), however, a Division Bench of this Court upheld the decree of the lower appellate Court, which had dismissed the suit *in toto*, reversing the decree of the Court of first instance, which had passed a decree in favour of the plaintiff (husband) conditional upon his paying the prompt dower. The ruling is in full accord with the *ratio decidendi* adopted in the case of *Sheikh Abdool Shukkoar* (1), which appears to be the leading case upon the point under consideration, so far as this Court is concerned. No ruling of any other High Court was cited at the hearing in support of the respondents' contention except the case of *Jaun Beebee* v. *Sheikh Munshee Beparee* (6) which does not appear to me to be decisive on either side of the contentions raised in the case. The ruling of this Court in *Sheikh Abdool Shukkoar* v. *Raheem-oon-nissa* (1) is, therefore, the only leading case upon the subject, but, with due deference, I am unable to agree in the rule there laid down.

The texts cited by the learned pleader for the respondents undoubtedly show, what is a well-recognised rule of the Muhammadan law of marriage, that the marriage contract having been

(1) N. W. P. H. C. Rep., 1874, p. 94.
(2) I. L. R., 2 All. 831.
(3) I. L. R., 4 All. 205.
(4) I. L. R., 1 All. 483.
(5) Weekly Notes, 1882, p. 96.
(6) 3 W. R. C. R., 98.

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completed and its legal effects having been estalished, the right of claiming prompt dower comes into existence in favour of the wife, and that she can use such a claim as a means of obtaining payment of the dower and as a defence for resisting a claim for cohabitation on the part of the husband against her consent. And when I say this, I put the case in favour of the respondents in its strongest possible light, for even upon this question in cases where cohabitation has taken place, the conflict of authority is too great to render it an undoubted proposition of the Muhammadan law. The learned Judges in the case to which I have just referred seem to have appreciated this difficulty, but preferred to adopt the view of Imam Abu Hanifa in preference to the concurrent opinions of his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, notwithstanding the fact that a passage was cited to them from the *Durrul Mukhtar* in support of the view that "where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." Both Imam Abu Hanifa and Imam Muhammad were purely speculative jurisconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Qazi Abu Yusaf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the *Khalifa* Harun-ul-Rashid, the advantage of applying legal principles to the actual conditions of human life, and his *dicta* (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction. But before proceeding any further, I wish to quote a passage from the celebrated *Fatawa Qazi Khan*, a text-book as high in authority as the *Durrul Mukhtar* :—

"A wife, having surrendered herself to her husband before the fulfilment (*i.e.*, payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abu Hanifa ; but Abu Yusaf and Imam Muhammad maintain that she has not the right of prohibiting him from connubial intercouse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And

according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey (1)" But the best summary of the law is to be found in the latest authoritative work on the Muhammadan law, the *Fatawa-i-Alamgiri* in a passage which Mr. Baillie has translated somewhat briefly at pages 124-25 of his celebrated Digest. The passage being the most complete exposition of the law upon the subject, I translate it here myself as closely as possible, from the original text itself :—

"In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment (*i e.*, payment) of her exigible dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples (Qazi Abu Yusaf and Imam Muhammad), and in like manner the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abu Hanifa, except when she goes out in an indecent manner. "As to her right to all this before she has surrendered herself (consummation), there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her whilst she is a minor or has been forced or insane, in which cases her father might refuse to surrender her until the payment of her prompt dower—so in the *Itabiyyah*. And if the husband has had connubial intercouse with her or retired with her with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement, or the prompt part of it according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaikh-ul-Imam, the jurisconsult, the pious Abul Qasim Assaffar, was accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in the matter

(1) امراة سلمت نفسها الى زوجها قبل استيفاء المهر ثم منعت نفسها لاستيفاء المهر كان لها ذلك في قول ابي حنيفه رحمه الله و قال ابويوسف و محمد ليس لها ان يمنعه من الوطي و اشتبهت الروايات عنهما في الامتناع عن المسافرة و على قول ابي القاسم الصفار لها ان يمتنع عن المسافرة (فتاوي قاضي خان كتاب النكاح) *

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of refusing herself, he used to decide according to the opinions of the two disciples, and several of our learned doctors have approved of this distinction (1)".

Having cited these various passages from text-books of the highest authority upon the Muhammadan law, I proceed to consider the exact effect they have upon the present case. And here I have to point out that in this case the Court of first instance found that no demand for dower had been made by the wife (defendant No. 2) before the institution of the suit, and that she had already cohabited with her husband, the plaintiff, and there is no question that she had attained majority when she was married. These matters were not dealt with by the lower appellate Court, which decided the case upon the preliminary point, and they may be taken to be so for the purposes of this reference.

I have already said enough to show that the right of dower does not precede the right of cohabitation which the contract of marriage necessarily involves, but that the two rights come into existence simultaneously and by reason of the same incident of law. The right of the wife to claim maintenance from her husband arises in the same manner as one of the legal effects of marriage, and to say that any of those effects are not simultaneously created by the contract of marriage amounts, in my opinion, to a violation of the fundamental notions of jurisprudence regarding correlative rights and obligations arising from one and the same perfected legal relation. Indeed, so far as the question now under consideration is concerned, the rules of Muhammadan

(1) في كل موضع دخل بها او صحت الخلوة و تاكد كل المهر لو ارادت ان تمنع نفسها لاستيفاء المعجل لها ذلك عنده خلافا لهما و كذا لا يمنع من الخروج والسفر والحج التطوع عنده الا اذا خرجت خروجاً فاحشاً و قبل تسليم النفس لها ذلك بالاجماع و كذا اذا دخل بها و هي صغيرة او مكرهة او مجنونة فللاب حبسها حتى يوفى لها المعجل كذا في العتابية ولو دخل الزوج بها او خلابها برضائها فلها ان تمنع نفسها عن السفر بها حتى تستوفي جميع المهر على جواب الكتاب والمعجل في عرف ديارنا عند ابي حنيفة رح و قالا ليس له ذلك و كان الشيخ الامام الفقيه الزاهد ابو القاسم الصفار رح يفتى في السفر بقول ابي حنيفة رح و في منع النفس بقولهما و استحسن بعض مشايخنا رح اختياره كذا في المحيط *

law leave no doubt when that system of law is consulted as a whole and not upon isolated points. The fact of the marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vestiture of the right, is to hold that a relationship, of which the rights and obligations are essentially correlative, may come into existence at one time for one party and another time for the other party. If the payment of dower were a condition precedent to the initiation of the right of cohabitation, a Muhammadan wife, having quarrelled with her husband, could not sue him for cohabitation till she had in a previous litigation sued and, obtaining a decree, realized her dower, because, *ex hypothesi*, her right of cohabitation with her husband would be dependent for its coming into existence upon the payment of her dower. Yet such is the logical result of the argument pressed upon us on behalf of the respondents. Such, however, is not the rule of the Muhammadan law, and even the passages which have been cited on behalf of the respondents do not support any such proposition. The passage in the Hedaya, which I have closely translated from the original Arabic text, no doubt entitles the wife to resist the claim of the husband for cohabitation with her by pleading the non-payment of her prompt dower, but it proceeds essentially upon the assumption that his right to put forward such a claim is antecedent to the plea. In the passage itself he is called "the rightful person," and the impediment to the enforcement of his right of cohabitation with his wife is stated to be the non-payment of her prompt dower, a rule which, having been borrowed from the Muhammadan law of sale, is based simply upon the analogy of the lien which the vendor possesses upon the goods for payment of the price before delivery. The rule is simply analogical, and giving to it its fullest scope, it falls far short of maintaining the proposition upon which the argument for the respondents rests. The passage from the *Durrul Mukhtar*, following the analogy of sale even further, expressly lays down that the right of the wife to resist the husband's claim for cohabitation is intended to be for the purpose of realizing her prompt dower. The same is the effect of the passage which I have cited from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, and the rule, as stated by the Muhammadan

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jurists, bears, in the eye of jurisprudence, the strongest possible analogy to the ordinary rule of the law of sale, which has been best stated in s. 95 of the Indian Contract Act (IX of 1872), namely, that "unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid." The same is the principle upon which, in the law of sale, the right of stoppage *in transitu* is based, and the lien which the vendor has amounts to nothing more or less than the definition given by Grose, J., in *Hammonds* v. *Barclay* (1), that it is "a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied" But this lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place. I have followed up the analogy of sale so far, because nearly the whole argument of the learned pleader for the respondents proceeded upon the circumstance that in the passages, which he cited, marriage has been compared to sale, dower to the price, and surrender of the wife to her husband to delivery of goods in the law of sale.

But to return to the passages which I have quoted from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, it is apparent that the sole object of the rule which entitles the wife to resist cohabitation is to enable her to secure payment of her prompt dower. And it is equally apparent from those passages that the opinion of Imam Abu Hanifa is contradicted, not only by his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, but also by Shaikh Assaffar so far as the question of cohabitation is concerned. Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan law as "the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third. Now, bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods in sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist

(1) 2 East, 227.

after consummation. According to the ordinary rule of interpreting Muhammadan law, I adopt the opinion of the two disciples as representing the majority of "the three Masters," and hold that, after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action.

But the rule enunciated by me need not be applied in its fullest extent to the present case, because here, in the first place, it has not been found that the wife ever demanded her dower before the suit was filed, or that she declined to cohabit with her husband the plaintiff upon the ground that her dower had not been paid. She relied upon allegations of divorce and cruelty, both of which were found by the Court of first instance to be untrue, and upon these findings I hold that she had no defence to the action. The plaintiff, as I have already shown, acquired by the very fact of the marriage the right of cohabitation; he was not bound to pay the dower before it was demanded, and upon the findings of the first Court, the first intimation which he had of such demand was the written defence of his wife (defendant No. 2) in the course of this unfortunate litigation. And upon intimation of such a demand, he actually brought the money into Court and deposited it for payment to his wife, the defendant No. 2, as her dower. Under such circumstances, the view of the learned District Judge, which follows the rulings to which he has referred, simply amounts to saying that the plaintiff must institute another suit like the present for enforcing the same remedy. I have already said that the present suit, bearing in mind the conjugal rights created by the Muhammadan law, was not premature, and the view of the learned District Judge can only have the effect of circuity of action in contravention of the maxim that it is to the benefit of the public that there should be an end to litigation.

This leads me to the consideration of the fourth point formulated by me at the outset, namely, the general law as to decrees in such cases. The question involves mixed considerations of substantive law and procedure, and the answer to it is fully fur-

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nished by the *dicta* of the Lords of the Privy Council in the case of *Munshee Buzloor Ruheem* v. *Shums-oon-nissa Begum* (1), to which reference has already been made. After giving a brief sketch of the matrimonial law of the Muhammadans, their Lordships went on to say: "The Muhammadan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Qazi. ..... Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Muhammadan law, as well as strict proof of the facts to which it is to be applied (p. 612)."

Abiding by this *dictum*, I have carefully considered the Muhammadan law as I have already stated, whilst the facts of the case must, for the purposes of this reference, be taken to be those found by the Court of first instance. And upon this state of things I am of opinion that the decree passed by the Court of first instance was right and proper. The question as to the form of decree in such cases and the manner in which it may be executed was discussed in a very learned judgment by Markby, J., in *Gatha Ram Mistree* v. *Moohita Kochin Atteah Doomoonee* (1) in which that learned Judge, after briefly reviewing the laws of other civilized countries, came to the conclusion that the Ecclesiastical Law of England was the only system which justified the view that "a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment;" but the learned Judge declined to follow that law in Indian cases, and held that the provisions of s. 200 of the old Civil Procedure Code (Act VIII of 1859) were not applicable to decrees for restitution of conjugal rights. The Legislature has, however, stepped in to remove doubts upon this point, and ss. 259 and 260 leave no doubt as to the manner in which a decree for recovery of a wife or for restitution of conjugal rights can be enforced under the present Code. The case before

(1) 11 Moo. I. A. 551. (2) 14 B. L. R., 298.

Mr. Justice Markby was, however, one between Hindus, and all that he said in that case would not necessarily apply to a case between Muhammadans. Nor need the English law upon the subject be consulted, though I may observe that, judging by the ruling of Mr. Justice Coleridge in *In re Cochrane* (1), the rule of English law as to the husband's general power over the wife's personal liberty goes as far as any civilized law can go in the direction of subjecting the wife to the control of the husband. An account of that case is given by Mr. Macqueen in his treatise on the Rights and Liabilities of Husband and Wife, and it appears that the order of the Court in that case was very peremptory—"Let her be restored to her husband." The rules of our law, however, necessitate no such course, and in passing decrees in suits for restitution of conjugal rights among Muhammadans, the *dictum* of the Privy Council already quoted furnishes the guiding principle. Courts of justice in India, in the exercise of their mixed jurisdiction as Courts of equity and law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case, upon the principles which have been so well stated by Mr. Justice Story in his celebrated work on Equity Jurisprudence, 11th ed., ss. 27 and 28. So I understand the principle upon which the observations of the Lords of the Privy Council in the case to which I have so often referred were based, and I may with advantage cite another passage from that judgment:—"It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Muhammadan law (pp. 615-616)."

In the case in which their Lordships made these various observations the question of non-payment of dower as a defence to the action did not arise, nor do the facts of the case as found in the

(1) 8 Dowling's P. C. 630; 4 Jur. 534.

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report show whether the dower was prompt or deferred, whether it had been demanded or not before institution of the suit, and of course there was nothing in the way of deposit by the husband of the amount of dower during the course of the trial in the Court of first instance. These are the distinguishing features of this case; and if the distinction has any tendency to alter the principle, such tendency is entirely in favour of the plaintiff-appellant's case.

To return once more to the case of *Sheikh Abdool Shukkoar* v. *Raheem-oon-nissa* (1), which is the leading case upon the subject, I have to observe, with profound deference, that the *ratio decidendi* adopted in that case seems to me to proceed upon a misconception of the rule of Muhammadan law as to the exact time when the right of mutual cohabitation vests in the married parties, and also as to the exact nature of the husband's liability to payment of dower, and the exact scope of the right which a Muhammadan wife possesses to plead non-payment of dower in defence of a suit by her husband for restitution of conjugal rights. It is one thing to say that such a defence may be set up under certain conditions; it is a totally different thing to say that "until the dower was paid no cause of action could accrue to the plaintiff." The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or by the wife, would be maintainable upon refusal by the other to cohabit with him or her; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt. Such was actually the form of the decree which was upheld by this Court in *Eidan* v. *Mazhar Husain* (2), and a decree to the opposite effect was approved by another Bench of this Court in *Nazir Khan* v. *Umrao* (3). Defences which do not go to the root of the action, but only operate in modification of the decree, are well known to our Courts, and the principles upon which they are based are recognised by Courts of equity both in England and in America under the general category of compen-

(1) N.-W. P. H. C. Rep., 1874, p. 94 (2) I. L. R., 1 All. 483.
(3) Weekly Notes, 1882, p. 96.

sation or lien when pleaded by the defendant in resistance or modification of the plaintiff's claim. I have already said enough, with reference to the argument of the learned pleader for the respondents, to introduce an analogical comparison between the contract of sale and the contract of marriage under the Muhammadan law, and between the claim of a Muhammadan wife for her dower and a lien as understood in the law of sale. "A lien is not in strictness either a *jus in re* or a *jus ad rem*, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged .....It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money."—(Story Eq. Jur, 11th ed., s. 506). So that, pushing the analogy of the law of sale to its fullest extent, the right of a Muhammadan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Muhammadan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights.

There is one more consideration which I wish to add to the reasons which I have already given at such length in support of my view. The Muhammadan law of marriage recognises nothing except *right*, in its legal sense, as the basis of legal relations and of those consequences which flow from them. And if the husband did not before payment of dower possess the right of cohabitation with his wife, it would follow as a necessary consequence in Muhammadan jurisprudence that, where the dower is prompt and cohabitation has taken place before the payment of such dower, the issue of such cohabitation would be illegitimate. It would be easy to show that such would be the logical consequence in Muhammadan law of the reasoning pressed on behalf of the respondents; but I need not go further in considering this matter, as I have referred to it only because in the course of the argument it was said that, before payment of prompt dower, the cohabitation of a Muhammadan wife with her husband was simply a matter of concession and not of right as understood in that law.

For these reasons I would answer the question referred to the Full Bench in the affirmative, leaving it to the Bench that re-

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ferred the case to deal with its other aspects. And I may add that I have considered it my duty to go so fully into this question out of respect for the rulings which were cited on behalf of the respondents, but in which I have been unable to concur, and also because such questions, which usually arise only among the poorer classes of the Muhammadan population, seldom come up to this Court for adjudication, but of course affect domestic relations of the Muhammadan community at large.

1886 *January* 22.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

DEOKISHEN (DEFENDANT) v. BANSI AND ANOTHER (PLAINTIFFS)*

Res judicata—Civil Procedure Code, ss. 562, 588 (28)—*Second appeal—Civil Procedure Code, ss.* 565, 566—*Determination of case by High Court.*

In a suit for pre-emption in respect of a share of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, *viz*, the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January, 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566, as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s 566, as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record.

Held by the Full Bench that the defendants were not prevented by the operation of the High Court's order of the 3rd January, 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions of fact involved therein were

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* Second Appeal No 1284 of 1884, from a decree of E. B Thornhill, Esq., District Judge of Jaunpur, dated the 17th July, 1884, reversing a decree of Babu Sanwal Singh, Munsif of Jaunpur, dated the 1st March, 1884.

decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit.

Per STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order, dealing with the plaintiffs' right of pre-emption, could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right.

Held by PETHERAM, C. J., and OLDFIELD and TYRRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen* v. *Jasoda Kuar* (1) referred to.

Per STRAIGHT and BRODHURST, JJ., *contra*. *Bal Kishen* v. *Jasoda Kuar* (1) referred to.

THIS was a reference to the Full Bench by Petheram, C. J., and Straight, J. The facts of the case and the questions referred are stated in the order of Straight, J.

STRAIGHT, J.—This is a suit for pre-emption. The plaintiffs assert a right of pre-emption on the basis of an award effected between the ancestors of the plaintiffs and the ancestors of the defendants 2 and 3, as also upon a condition of the terms of the *wajibularz*, a copy of which they allege themselves unable to produce by reason of the same having been destroyed at the time of the mutiny. On the basis of these allegations, the plaintiffs seek to avoid and cancel an alleged sale by the 2nd and 3rd defendants to the 1st defendant of an 8 annas share of mauza Chuk-Sadho. The defendants pleaded that Chuk-Sadho was not a village to which the award relied on by the plaintiffs had reference; that no custom of pre-emption existed in that village; and that the amount of consideration for the sale impeached and sought to be set aside by plaintiffs was paid in full. It therefore comes to this, that the plaintiffs come into Court asserting that an agreement was come to, by which their ancestors were entitled to assert pre-emption in respect of Chuk-Sadho. The Munsif of Jaunpur, who tried the suit as a Court of first instance, virtually disposed of it on the point that the village Chuk-Sadho did not form part of Basdeo Patti, to which

(1) I. L. R., 7 All. 765.

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alone the award had reference; and he seems to be of opinion that no custom of pre-emption had been established. The learned Judge, before whom the case came in first appeal, differed from the Munsif on the point of Chuk-Sadho being unaffected by the award, and considered that there was a strong presumption in favour of the village Chuk-Sadho having formed an integral part of Basdeo Patti.

He further held that by the award of 1248 Fasli the right of pre-emption is proved to have existed in Basdeo Patti, and therefore corollarily in Chuk-Sadho. He further noticed that in the *wajibularz* for 1881 the co-sharers of Chuk-Sadho have acknowledged the custom of pre-emption to exist "in the future." "I have no doubt," he observed, "that it also existed in the past as alleged by the plaintiffs."

Having found these facts, the Judge reversed the decision of the Munsif, decreed the appeal, and remanded the case under s. 562, to the Munsif, for a decision on the remaining issue of fact.

This order of remand under s. 562 of the Code was open to appeal to the High Court under s. 588 and was so appealed. The pleas in such appeal shortly were that the District Judge was wrong in holding that Chuk-Sadho village was part of Basdeo Patti; that the *wajibularz* was not admissible as evidence; and that the custom had not been proved. The High Court, consisting of the Hon'ble Mr. Justice Oldfield and the Hon'ble Mr. Justice Brodhurst, heard this appeal on the 3rd of January, 1884, and passed the following order:—

"We are not disposed to interfere with the finding, which is one of fact, that the plaintiffs have a right of pre-emption: the appeal is therefore dismissed with costs.

"The Judge was in error in remanding the case under s. 562, and his order so far is set aside, and he is directed to proceed under ss. 565 or 566, Civil Procedure Code, as may be applicable."

Now a great deal of argument has been addressed to us with respect to this order of the 3rd January, 1884; but before considering this further, it will be convenient to notice what followed upon the passing of this order.

The case went back to the District Judge of Jaunpur, and I must conclude that the last portion of the order was the operative part of the same, namely—

"The Judge was in error in remanding the case under s. 562, and his order so far is set aside, and he is directed to proceed under ss. 565 or 566, Civil Procedure Code, as may be applicable."

The Judge of Jaunpur then replaced the case on his file; but as the issue as to the amount of consideration had not been tried, he remanded the suit under s. 566 for evidence and a finding on this point; and in due course a finding was recorded, and the Judge having accepted that finding, which was necessarily confined to the question of the amount of consideration, the case now comes up again in second appeal in the High Court and three pleas have been urged before us—(1) that neither according to the *wajib-ularz* nor local custom have plaintiffs a right of pre-emption; (2) that inasmuch as some of the plaintiffs were strangers and not co-sharers, the co-sharer plaintiffs had lost any right of pre-emption they might have had; and (3) that the suit was barred by limitation.

The point we have been concerned with and have heard argued at great length is, whether the finding as to the custom of pre-emption is *res judicata* by reason of the order of this Court dated the 3rd January, 1884. It seems to me, however, that that question does not strictly arise in this appeal, because, in my opinion, the Judge of Jaunpur, who was first seized with it, dealt with it and disposed of it upon a condition of things which plaintiffs had never asserted. The Judge treated it as a custom, and not, as alleged by plaintiffs, as arising from the terms of a contract or agreement between the ancestors of the parties. In my opinion the Judge has not decided according to law; and if I were deciding the case I should order the case to be sent to the District Judge to be tried according to the allegation of the plaintiffs; but there is a difficulty, as all the evidence that is necessary to the determination of the case is on the record; and the learned Chief Justice is strongly of opinion that under s. 565 of the Code we are bound—although the case is before us in second appeal, and there being the whole evidence on the record—to examine that evidence,

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and decide the case according to that evidence. I am committed to a contrary opinion; and, as at present advised, see no reason to alter that opinion, and therefore, under these circumstances, and looking to the fact that my brothers Oldfield and Brodhurst may be able to afford us their assistance, we propose to submit the question for the decision of the Full Bench in the following terms:—

(1) Are the defendants prevented by the operation of the order of this Court, dated the 3rd January, 1884, from disputing the right of pre-emption in any way?

(2) Can this Court look into the evidence already on the record for the purpose of finding whether a right of pre-emption exists, in fact, in the village Chuk-Sadho, if the evidence for answering this question is already on the record, or must this Court refer the question to the Court of first appeal?

PETHERAM, C. J.—I concur with my brother Straight in submitting the above questions for the consideration and decision of a Full Bench.

Lala *Juala Prasad* and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Kashi Prasad*, for the respondents.

PETHERAM, C. J.—I am of opinion that our answer to the first of the two questions which have been referred to us should be in the negative. The reason for this opinion is, that the decision which is relied on and set up as concluding the matter, is a decision of a merely interlocutory character, which was passed in the same suit which is now before us. I am of opinion that the questions of fact involved in that interlocutory proceeding were decided only so far as was necessary for the purpose of passing the order; and that that decision must not be regarded as determining the main question in the suit, which is still open, and must be decided in the final decree in the suit.

Upon the second question referred to the Full Bench, I am of opinion that our answer should be in the affirmative. In the case of *Bal Kishen* v. *Jasodá Kuar* (1) I have already stated my

(1) I. L. R., 7 All. 765.

views upon this subject, and I have nothing to add to what I then said except that I entirely adhere to it.

STRAIGHT, J —With reference to the first question referred to the Full Bench, I am of the same opinion. The decision of this Court, which is prayed in aid and set up as matter of *res judicata*, as regards the plaintiff's right of pre-emption, is one which was passed on an appeal from an order of remand by the Judge under s. 562 of the Civil Procedure Code, which was preferred to this Court under s. 588. Under the provisions of s. 562, the Judge before whom the appeal from the Munsif came, was only competent to remand the case to the Munsif, if it appeared to him that the Munsif's decree had "disposed of the case upon a preliminary point, so as to exclude any evidence of fact" essential to the determination of the rights of the parties. The jurisdiction of the Judge to pass an order of remand under s. 562 was limited by the terms of that section ; and that being so, the jurisdiction of this Court was similarly limited in dealing with an appeal from his order preferred under s. 588. Under these circumstances the remark made in the order of this Court, dealing with the plaintiff's right of pre-emption, can only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right. The part of this Court's order which was within the competence of the Court to make under ss 562 and 588 was the latter part, in which it was held that the Judge was wrong in remanding the case under s 562, because, as a matter of fact, the Court of first instance had not disposed of the suit in the manner contemplated by that section..

Upon the second question referred to the Full Bench, as I understand the majority of the Court to be in favour of giving an answer in the affirmative, and as the question is one relating to practice, I am unwilling to say anything that might seem like a reflection upon the opinion of the majority of the Court ; and I prefer to say merely that I adhere to the view which I expressed in *Bal Kishen* v. *Jasoda Kuar* (1).

OLDFIELD, J.—I concur with the learned Chief Justice in the answers which he proposes to both of the questions referred to the Full Bench.

(1) I. L. R., 7 All. 765.

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BRODHURST, J.—I concur with the learned Chief Justice upon the first question. Upon the second, it is enough for me to say that I concur in the opinion expressed by my brother Straight in *Bal Kishen* v. *Jasoda Kuar* (1).

TYRRELL, J.—I concur upon both questions in the answers proposed by the learned Chief Justice.

APPELLATE CIVIL.

1886 *January* 29

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SUBA BIBI (PLAINTIFF), *v.* BALGOBIND DAS (DEFENDANT.)

Fraudulent transfer—Burden of proof—Muhammadan Law—Sale of immoveable property by Muhammadan in satisfaction of wife's dower—Consideration—Deferred debt.

A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. *Wood* v. *Dixie* (2), *Chowe* v. *Baylis* (3), and the authorities collected in the notes to *Twyne's Case* (4) referred to.

Pending a suit for recovery of a debt, the defendant, who was a Muhammadan, executed a deed of sale dated in June 1882, of a four annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order.

Held, that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. If was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect,

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* Second Appeal No. 518 of 1885, from a decree of C. Donovan, Esq., Officiating District Judge of Benares, dated the 19th December 1884, reversing a decree of Shah Ahmad ul lah Munsif of Benares, dated the 8th February, 1884.

(1) I. L. R., 7 All 765.
(2) 7 Q. B., 892
(3) 31 L. J., Ch., 757.
(4) 1 Smith's L. C., 12.

either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor, and as such liable to the attachment.

Held, applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Lala *Juala Prasad*, for the appellant (plaintiff).

Mr. *T. Conlan* and Munshi *Sukh Ram*, for the respondent (defendant Balgobind Das).

STRAIGHT, J.—This was a suit brought under the following circumstances:—The plaintiff, Suba Bibi, is the wife of the defendant Muhammad-ud-din and was married to him in 1877. On the 22nd May, in that year, Muhammad-ud-din executed a *kábín-náma* (1) in her favour, declaring the sum of Rs. 4,000 to be the amount of deferred dower due to her, and hypothecating a four-anna zamindari share. This instrument was not registered. Some time in June, 1882, the defendant Balgobind Das commenced a suit against Muhammad-ud-din for recovery of a debt due to him from that person, and applied for attachment before decree of the four-anna share, which application was refused. On the 23rd June, 1882, Muhammad-ud din executed a deed of sale of the four-anna share in favour of Suba Bibi, the plaintiff, the consideration recited therein being the amount of the dower-debt. Subsequently Balgobind Das obtained a simple money-decree against Muhammad-ud-din for Rs. 925-5-0, and in execution attached the four-anna share. Suba Bibi objected to the attachment on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. Hence the present suit for a declaration of her right, and to set aside the attachment order. The Subordinate Judge decreed the claim; but the Judge, on appeal, holding that "the sale-deed was written simply in view to delay and defeat the creditor of the vendor," reversed his decision, and dismissed the suit. It is from the Judge's decree that the appeal to this Court

(1) Deed of dower.

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by Suba Bibi is preferred. It will be convenient here to remark that the proof put forward by the defendant in answer to the plaintiff's claim consists of the plaint in the former suit against Muhammad-ud-din, and the order of attachment obtained by him under his simple money-decree, bearing date the 5th July, 1882. Beyond this there is no other proof. The question, then, with which we are concerned is, whether the Judge's judgment can be sustained. In my opinion it cannot. A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart, of course, from cases in which either insolvency or bankruptcy is involved, is not void. In other words, if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. In *Wood* v. *Dixie* (1) the Court of Queen's Bench held that a sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment-creditor; and in the days when there was forfeiture on conviction for felony, it was ruled that an assignment before conviction, if made *bonâ fide*, was not assailable—*Chowne* v. *Baylis* (2); and see the authorities collected in the notes to *Twyne's Case* (3). In the present case, if there was, in fact, a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four-anna share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court has any power to disturb it. It was for the defendant Balgobind Das to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four-anna share still continuing the property of Muhammad-ud-din and as such liable to the attachment. I

(1) 7 Q. B., 892. (2) 31 L. J., Ch., 757.
(3) 1 Smith's L. C., 12.

have already stated that the only materials put forward by the defendant Balgobind Das to support his plea of fraud are the plaint and the order of attachment in the suit of 1882. These of themselves are next to worthless; for, as I have observed, if Muhammad-ud-din did make the assignment of his property to his wife *bonâ fide* and in payment of the dower-debt, it does not, in the slightest degree, matter that he did so to defeat any stops in execution that might be taken against him by Balgobind Das. The Judge's decision, therefore, so far as the grounds upon which he bases it are concerned, cannot be sustained. It remains, however, to be seen whether there was consideration for the sale; in other words, was the deferred dower-debt good and valid consideration? The general rule of the Muhammadan law is, that "dower, like any other debt, may be made a consideration for a transfer of property from the husband to the wife"—*Tagore Lectures*, 1873, p. 362; and when after dower has been fixed at a certain amount at marriage, and the husband subsequently sells his immoveable property in lieu of a part or the whole of such amount of dower, a person entitled to the right of pre-emption may assert it—*Fida Ali* v. *Muzaffar Ali* (1). Upon the subject of deferred debts, the following passage from the *Fatawa-i-Qazi Khan*, Vol. III., p. 502, is important:—"If a person by whom a deferred debt is due makes a compromise with the creditor that the debt shall become exigible forthwith, it is valid when made without consideration, because the postponement was the right of the debtor, which he was entitled to forego. Similarly, if he should say 'I have annulled the postponement of this debt,' or 'I have relinquished the postponement,' this would amount to his saying 'I have rendered the debt exigible forthwith.'" So at p. 497 of the second volume of the same work, it is laid down:—"If a person to whom a deferred debt is due should purchase anything from his creditor in lieu of the deferred debt, and after taking possession should return the same by cancellation of the sale, the condition as to postponement of the debt does not revive." Applying these general principles as to deferred debts to the particular dower-debt with which we are concerned in the present case, I think that there was good consideration for the sale of the 23rd of June,

(1) I. L. R., 5 All. 65

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1882, by Muhammad-ud-din to the plaintiff, and that, in the absence of proof of fraud of the kind I have indicated by Balgobind Das, she is entitled to maintain it, and to succeed in the present suit. I quite agree as to the propriety of scrutinizing closely transactions of such a character between husband and wives, but as in, I should say, ninety-nine out of a hundred cases among Muhammadans a dower-debt is due from the husband—a fact of which most people are aware—those who deal with the husbands have no reason to complain if, having failed to obtain security, they find themselves defeated by the preferential payment of a debt which stands upon just as legal a footing and equality as their own. In the view I take of the matter, the appeal is decreed with costs, and the decision of the Subordinate Judge being restored, the plaintiff's claim will stand decreed with costs in all Courts.

BRODHURST, J.—For the reasons given by my brother Straight, I concur with him in decreeing the appeal, and in restoring the judgment of the Court of first instance, with costs in all the Courts.

Appeal allowed.

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February 5.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ALLAH BAKHSH (DEFENDANT) *v.* SADA SUKH AND OTHERS (PLAINTIFFS) *

Mortgage by conditional sale—Interest—Foreclosure.

A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest :—'As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits". The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decree. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest.

Held that whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to

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* Second Appeal No. 556 of 1885, from a decree of Rai Choda Lal, Subordinate Judge of Farukhabad, dated the 26th February, 1885, affirming a decree of Maulvi Munirudin Ahmad, Munsif of Chibramau, dated 10th December, 1884.

get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshar Singh* v. *Kanahia Sahu* (1) referred to.

THE plaintiff in this suit claimed to foreclose a mortgage. It appeared that on the 27th May, 1872, a certain person mortgaged by conditional sale, for Rs. 150, certain immoveable property to the plaintiff. The mortgage-deed provided that possession should be given to the mortgagee, and that the principal money should be paid within ten years from the date of execution of the deed, and in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"It has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. On the 18th June, 1878, the mortgaged property was purchased by the defendant Allah Bakhsh, at a sale in execution of decree. On the 20th September, 1884, the plaintiff brought the present suit against the heirs of the mortgagor and the purchaser in the Court of the Munsif of Chibramau praying for foreclosure, and claiming the mortgage-money with interest at 8 annas per cent. per mensem. The defendants pleaded, *inter alia*, that, having regard to the terms of the mortgage-deed, the plaintiff was not entitled to claim interest. On this point the Munsif made the following observations:—"It is admitted that the plaintiff did not get possession. There is consequently no reason why he should not get interest or mesne profits or damages. It is proved from the statement of the plaintiff's witnesses that the mortgaged share yielded a profit of Rs. 200 a year. The plaintiff was deprived of that profit. If the plaintiff had brought a suit for compensation, he would have got it to the extent proved; but, instead of claiming compensation or mesne profits, he has claimed interest at a very low rate. This is not at all unfair. In my opinion, he is undoubtedly legally entitled to get the interest claimed. Interest has always been allowed in cases where the mortgagee has not received possession." The Munsif decreed the claim, and ordered that if, within six months from the date of decree, the principal sum, with the interest claimed, were not paid by the defendants, the

(1) I. L. R., 3 All 652.

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latter should be absolutely debarred of all right to redeem the property.

The defendant Allah Bakhsh appealed from this decree, on the grounds that "if the respondent failed to obtain possession according to the condition, it was his own fault;" and that "as the mortgage was not made known at the time of the purchase by the appellant, the interest on the mortgage-money cannot be charged on the mortgaged property." The appeal was heard by the Subordinate Judge of Farukhabad, whose judgment contained the following observations:—"As possession was not delivered, there is no reason why the plaintiff should not recover interest on the mortgage-money. There is no rate of interest entered in the mortgage-deed, but the plaintiff has claimed a very low rate of interest. Hence the plaintiff's claim to interest is open to no objection. The defendant's plea that as the plaintiff delayed in obtaining possession, his claim to interest abated is improper ..... As the auction-purchaser purchased the property subject to lien, that property is liable for all that lien with which it stood charged at the time of the purchase, or with which it was charged subsequent to the purchase ..... It has been contended that the interest in such cases is simply damages, which ought to be charged on the person of the executant or his representative, and that it has nothing to do with the property. This argument of the appellant is rebutted in this way, that the mortgage-deed is dated the 27th May, 1872, and is conditional for ten years, while the defendant purchased the property on the 18th June, 1878, at auction. Therefore, just as the original mortgagor was personally liable for damages, the auction-purchaser also became liable for damages in consequence of his not delivering possession within the prescribed time." The Court dismissed the appeal.

In second appeal by the defendant Allah Bakhsh, it was contended on his behalf that the lower Courts had erred in allowing interest as claimed, and in decreeing foreclosure in respect of interest as well as the principal due under the mortgage.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondents, heirs of the original plaintiff, deceased.

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BRODHURST and TYRRELL, JJ.—The ruling in the Full Bench case of *Rameshar Singh* v. *Kanahia Sahu* (1), the principle of which was adopted in the case of F. A. No. 37 of 1885, determined here on the 27th January, 1886, is altogether in point, the case of the present appellant being even stronger than that of the Full Bench ruling above cited. In the contract made between the vendor and the respondents on the 27th May, 1872, it was expressly agreed that no interest was exigible or payable under the conditional sale-deed. Whatever claim the respondents may have against their mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, they have none enforceable in this respect against the land which has passed free from charge for interest to the appellant by purchase. The appeal must prevail, and is decreed with costs.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

1886 *February* 12.

DIP NARAIN RAI AND OTHERS (PLAINTIFFS) *v.* DIPAN RAI AND OTHERS (DEFENDANTS).*

Bond—Interest—Penalty.

The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender.

In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the Puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond

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* First Appeal No 69 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghâzipur, dated the 27th January, 1885.

(1) I. L R., 3 All 653.

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to the date of the institution of the suit at Rs. 15 per annum, and compound interest for the same period at the same rate.

Held that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date.

Held that, for this purpose, the proper course was to reduce the interest to Rs 9 per cent per annum reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs 9 per cent from the due date of payment, upon the entire sum which was due when the bond became due, *i.e.*, the principal added to the compound interest calculated at Rs 9 per cent.

The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs 9 per cent. per annum There was a provision in the bond that if the principal and interest were not paid on the due date the obligee should be entitled to recover the principal with interest at the rate of Rs 24 per cent per annum from the date of the bond In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs 24 per cent, per annum

Held that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond, and that as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs 9 per cent per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.

THE suit out of which this appeal arose was one for the principal moneys and interest due on two bonds The first bond, which was dated the 3rd February, 1877, was one for Rs. 1,475 payable on the last day of Jaith, 1289 fasli, corresponding with the 1st June, 1882 The rate of interest was Rs. 9 per cent per annum, and the interest was payable on the Puranmashi of every Jaith, and there was a proviso in the bond that if the interest were not duly paid, the rate should be increased to Rs 15 per cent. per annum, and compound interest should be payable. The second bond, which was dated the 25th June, 1879, was for Rs. 725, payable with interest at the rate of Rs. 9 per cent. per annum on the same date as the principal of the first bond was payable. There was a proviso that if the principal and interest

were not paid on the due date, the obligees should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. The plaintiffs claimed interest on the principal amount of the first bond from its date to the date of the institution of the suit at the rate of Rs. 15 per cent. per annum, and compound interest for the same period at the same rate. They claimed interest on the principal amount of the second bond from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum. The suit was instituted on the 2nd December, 1884. The Court of first instance refused, in respect of the first bond, to allow compound interest or the increased rate of interest except from the date of default, that is to say, it allowed interest from the date of the bond to the date it became due at the original rate, and from the latter date to the date of the institution of the suit it allowed interest on the consolidated amount of principal and interest at Rs. 15 per cent. In respect of the second bond, the Court awarded interest from its date at Re. 1 per cent, thus increasing the original rate by four annas per cent. per mensem.

The plaintiffs appealed on the ground that they were entitled to recover the whole amount of interest claimed by them.

Munshi *Hanuman Prasad* and Lala *Juala Prasad*, for the appellants.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the respondent.

PETHERAM, C. J.—This appears to me to be a case in which it will be well to consider the proper manner of dealing with bonds of this description. The suit was brought to recover the principal and interest due on two bonds, and the question was what amount was recoverable for interest? By the terms of the first bond, the interest was to be at the rate of Rs. 9 per cent., and was payable yearly, and there was a proviso that if it was not paid when due, it should be increased to Rs. 15 per cent., and should be calculated as compound, and not as simple interest. It is clear that when a man lends money, for the use of which interest is to be paid, and the interest is not paid when it becomes due, the borrower breaks his contract, and the lender may re-

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cover damages for such breach, and, at the time of making the contract, it is open to the parties to consider and agree the amount of damage which in such a case the borrower shall pay for having broken his contract, or may name a penal sum which shall be the outside limit of the damage which can be recovered. It is clear that an agreement, that if the interest is not paid punctually, the lender shall be entitled to add it to the principal, and so recover compound interest, will indemnify the lender against loss, because although he does not get his money, he leaves it at interest, and therefore sustains no loss. Again, it is clear that a lender may indemnify himself in another way. He may do so by stipulating that, in the event of interest not being paid punctually upon the date it is due, the rate of interest shall be increased. But it is obvious that if he insists on *both* kinds of damages, that cannot be a fair agreement with reference to the loss sustained by him, as the two together amount to more than an indemnity against loss, and so must be a penalty.

In this case, the lender stipulates for both kinds of damages. He stipulates for compound interest as an indemnity against loss, and also for interest to be paid at an increased rate. These two stipulations put together cannot, as I have said, be regarded as a fair agreement with reference to the loss sustained by the lender, but as a penalty; and it is therefore the Court's duty to limit that penalty to what is the real amount of damage sustained by the plaintiff, who is the lender, in consequence of the defendant's breach of the contract to pay the interest at the due date. The rate of interest at which the money was lent was Rs. 9 per cent. per annum, and if the interest be calculated with rests, that is if compound interest is allowed, the lender will be completely indemnified against loss. The proper course therefore will, I think, be to reduce the interest to Rs. 9 per cent per annum, reckoned at compound interest, with yearly rests, to the due date of the bond. From the time when the principal became due under the bond, no provision for payment of interest is made, and the plaintiff is to blame for not having enforced his remedy at an earlier date; and, in my opinion, he should only recover simple interest at Rs. 9 per cent. from the due date of the bond to the date of payment, upon the entire sum which was due when the bond

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became due, that is to say, the principal added to the compound interest calculated at Rs. 9 per cent.

With reference to the second bond, in which the parties agreed upon an increased rate of interest on non-payment by the borrower at the specified time, and in which they did not agree that interest should be calculated at compound interest, it seems to me that such increased rate of interest may fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay on the due date, and therefore that Rs. 2 per cent. per mensem, the increased amount agreed on, should be paid down to the date when the bond became due. But as the plaintiff failed to compel payment, and allowed it to remain overdue for a long time, I think that the interest may fairly revert to the old rate of Rs. 9 per cent. from the due date of the bond, and the amount must be calculated from that date on that basis on the whole amount of principal and interest then due on the bond. Costs will be paid in both cases in all Courts in proportion to success.

OLDFIELD, J.—I am of the same opinion.

FULL BENCH.

1886 February 13.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MAHADEO PRASAD (PLAINTIFF) *v.* MATHURA AND OTHERS (DEFENDANTS).*

Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 7, 95 (*l*)—*Ex proprietary tenant—Determination of rent by Revenue Court—Suit for arrears of rent as so determined for period prior to such determination.*

An application was made in the Revenue Court under s. 95 (*l*) of the N.-W. P. Rent Act (XII of 1881), by the purchaser of proprietary rights in a mahál, for determination of the rent payable by his vendors, who had become, under s. 7, his ex-proprietary tenants in respect of the land they had previously held as *sír*. The Revenue Court, by an order dated the 18th February, 1884, fixed the rent at a particular sum, payable annually, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act. In May, 1884, the purchaser sued the ex proprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order.

* Second Appeal No. 154 of 1885, from a decree of W. Barry, Esq., District Judge of Bánda, dated 12th December, 1884, reversing a decree of Babu Harnam Chander Seth, Assistant Collector of Karwi, dated the 25th August, 1884.

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Held by the Full Bench, that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February, 1884, subject to any question of limitation that might arise.

THIS was a reference to the Full Bench by Oldfield and Brodhurst, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows :—

"The plaintiff purchased the proprietary rights and interests of the defendants, and obtained possession in January, 1881. The defendants thereupon became ex-proprietary tenants of the plaintiff in respect of the land they had previously held as *sir* under s. 7 of the Rent Act. In 1883 the plaintiff filed an application in the Revenue Court under s. 95 (*l*), for determination of the rent payable by the defendants on the holding.

"It appears that the *sir* holding had been recorded in the *jamabandis* with a rent payable on it of Rs. 168-9-3, and the plaintiff asked to have the same enhanced at the prevailing rates. The Revenue Court fixed the rent payable annually by the defendants at Rs. 170-14-11, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act.

"The Revenue Court's order is dated 18th February, 1884.

"The plaintiff has now brought this suit to recover arrears of rent, at the sum so fixed, for the years 1289, 1290, 1291 fasli, ending the 30th June, 1884, that is, for a period prior to the order of the Revenue Court determining the rent.

"We may add that there has been no express contract on the part of the defendants to pay rent, nor have they paid any rent to the plaintiff on the holding, but the defendants became, by operation of law (s. 7 of the Rent Act), tenants of the plaintiff from the time of sale, with a liability to pay him rent at four annas less than the prevailing rate payable by tenants-at-will for land of similar quality and similar advantages; and the question arises whether they are not in consequence bound to pay rent from the date of sale at the amount fixed subsequently by the Revenue Court; and if the order of the Revenue Court cannot have retrospective effect, whether they are not, as tenants, under a liability to pay some rent which a Revenue Court can enforce, and if so, on what principle should the amount of rent be decreed?

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"We refer to the Full Bench the question whether the plaintiff is entitled to recover arrears of rent for the years in suit, at the amount determined by the Revenue Court's order of the 18th February, 1884, and if not, can he recover any, and what amount of rent in the Revenue Court?"

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant (plaintiff).

Mr. *W. M. Colvin* and Babu *Sital Prasad Chattarji*, for the respondents (defendants).

PETHERAM, C. J.—I am of opinion that in this case the plaintiff is entitled to recover arrears of rent for the years in suit at the amount determined by the order of the Revenue Court dated the 18th February, 1884, subject, of course, to any question that may arise under the Limitation Act, which is not before us, and upon which I express no opinion. My reasons for this opinion are, that the tenancy was created by the plaintiff's purchase of the original landlord's interest, and the rent, when fixed under the statute which provides the means for determining the rent payable, becomes the rent which is to be paid during the whole tenancy, or the rent of the land held by the tenant during the whole of his tenancy; and as soon as that has been fixed, the landlord can put his remedies in force, if the tenant fails to pay the debt. I would answer the questions referred in the affirmative.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

CIVIL REVISIONAL.

1886 *February* 18.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BANDHAN SINGH (PLAINTIFF) *v.* SOLHU AND OTHERS (DEFENDANTS).

"*Decree*"—*Order rejecting application under Civil Procedure Code, s. 44, Rule a, and returning plaint—Appeal—Civil Procedure Code, ss* 2, 44.

No appeal lies under any of the provisions of s. 588 of the Civil Procedure Code from an order under s. 44, Rule *a*, rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property.

* Application No. 6 of 1886, for revision under s. 622 of the Civil Procedure Code of an order of H. A. Harrison, Esq., District Judge of Meerut, dated the 2nd October, 1885, affirming an order of Babu Mrittonjoy Mukarji, Subordinate Judge of Meerut, dated the 3rd August, 1885.

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In a plaint filed in the Court of a Subordinate Judge, the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave, under s 44, Rule *a*, of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively, in the Court of the Munsif.

Held that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule *a*, of the Code, its effect was to reject the plaint; that such an order was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622.

THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. It appeared that a plaint was presented in the Court of the Subordinate Judge of Meerut, in which the plaintiff claimed possession of certain houses, and also certain grain, which it was alleged was in the houses. At the same time the plaintiff presented an application, under s. 44 (*a*) of the Civil Procedure Code, in which he asked the leave of the Court to join the claim for the grain with the claim for the houses. The plaint was registered. On the 3rd August, 1885, the Subordinate Judge rejected the application, and on the same day made the following order on the plaint:—"This plaint was registered by a mistake of the office, and should not have been registered until the application of plaintiff for permission to join two causes of action was disposed of by the Court The application for permission to join the causes of action in the same suit has been disallowed to-day. This plaint is therefore returned to the plaintiff, in order that he may file two separate suits in the Court of the Munsif of Gháziabad."

The plaintiff appealed to the District Judge of Meerut from the order refusing his application. The District Judge dismissed the appeal, holding that the order was not appealable.

The plaintiff preferred the present application on the grounds (i) that the claims for the houses and the grain had been properly joined; (ii) that if permission under s. 44 of the Civil Procedure

Code was necessary, the Subordinate Judge had improperly refused such permission; and (iii) that the plaint had been erroneously returned for amendment.

Lala *Juala Prasad*, for the plaintiff.

Pandit *Sundar Lal*, for the defendant.

OLDFIELD and TYRRELL, JJ.—This is an application under s. 622 of the Civil Procedure Code. The petitioner instituted a suit by filing a plaint in the Subordinate Judge's Court, in which he claimed to recover possession of a house, together with some grain which was stored in it. The plaint was registered. Subsequently to its registration, it appears to have been considered that the claim for grain could not be joined in the same suit with the claim for possession of the house under the terms of s. 44 (*a*), by which no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property.

Accordingly the plaintiff filed an application to the Subordinate Judge for leave to join the cause of action. The Subordinate Judge refused leave, and returned the plaint with directions that the petitioner should institute two separate suits for the recovery of the house and the grain in the Court of the Munsif of Ghází-abad.

The plaintiff (petitioner) appealed from the order refusing leave under s. 44 (*a*) to the Judge, and the Judge dismissed it on the ground that no appeal lay from the order to him.

The plaintiff has now appealed to this Court to revise the orders of the Courts below under s. 622 of the Civil Procedure Code.

There was no appeal to the Judge from the order of the Subordinate Judge under any of the provisions in s. 588 of the Civil Procedure Code. He therefore rightly dismissed the appeal, which had been instituted as an appeal from an order, and this Court cannot interfere in revision with his order. Nor, however irregular the Subordinate Judge's order may be, is this Court empowered to interfere with it under s. 622.

The order of the Subordinate Judge is substantially an order rejecting the plaint. It was made on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable

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property. This may be a misapplication of s. 44 (*a*); but the effect of the order was to reject the plaint, and such an order is a decree, with reference to the definition in s. 2 and is appealable as a decree to the Judge, and in consequence an appeal lies in the case to the High Court, and that Court cannot interfere under s. 622.

On these grounds the application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

1886 *February* 25.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

GANGA SAHAI (PLAINTIFF) *v.* LACHMAN SINGH AND ANOTHER (DEFENDANTS.) *

Mortgage—Usufructuary mortgage—Interest—Waiver.

By a deed of usufructuary mortgage dated in 1875 a sum of Rs. 30,000, with interest at Re. 1 per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and, among these, a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 per cent. per mensem.

Held, that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, *i.e.*, Re. 1 per cent. per mensem.

ON the 26th April, 1875, the defendants in this case gave the plaintiff a usufructuary mortgage of certain shares in certain villages for a period of ten years. The principal sum secured by

* First Appeal No. 94 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 18th February, 1885.

the mortgage was Rs. 30,000, and the mortgage-deed contained the following provisions:—

"We will place the mortgagee in possession of the mortgaged property. The interest, with expenses, is agreed upon to be Re. 1 per cent. per mensem, and the profits of the mortgaged villages are fixed to be Rs. 2,812 per annum, and Rs. 3,600 on account of interest will be due from us to the mortgagee. We will pay Rs. 788 in cash every year to the mortgagee. Should the profits exceed Rs. 2,812, the mortgagee will take the excess as commission for collections. We declare that the mortgagee shall remain in possession and receive the profits in lieu of interest after paying the Government revenue. Any increase effected by the mortgagee during the period of mortgage shall be his. After the expiration of the period, we will pay back the mortgage-money in a lump sum and redeem our property. Should we fail to do so, the mortgagee shall remain in possession, and we will not interfere. Should the possession of the mortgagee be interfered with, by reason of the order of any Court or the violence of the mortgagors, the mortgagee shall be competent to realize the mortgage-money, with the interest which may be found due, from our persons, the mortgaged property and our other property, whether the term has expired or not, and the interest for the period the mortgagee is out of possession shall be charged at the rate of Re. 1-6 per cent. per mensem. We will get mutation of names effected by the end of Kuar. Should we fail to get mutation of names effected, or not allow the mortgagee to collect, the mortgagee shall, without regard to the period, cancel all the conditions of the deed, and shall realize all the money with interest at the rate of Re. 1-6 per cent. per mensem, to be charged from the date of execution of the deed, by instituting a suit. He shall also be competent to obtain proprietary possession by bringing a suit."

The plaintiff was not placed in possession of the mortgaged property, nor was he paid any interest by the defendants.

In November, 1884, the plaintiff brought this suit against the defendants to recover the mortgage-money. He claimed interest from the date of the mortgage-deed to the date of suit at Re. 1-6 per cent. per mensem.

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With reference to the interest claimed the defendants stated in their written statement as follows:—"The plaintiff, though repeatedly told by the mortgagors, intentionally did not take possession of the mortgaged property, nor did he get mutation of names effected under s. 97, Act XIX of 1873. The plaintiff committed this omission with the particular object, and under the misapprehension, that he might be considered entitled to get interest at Re. 1-6-0 per cent. per mensem. Under these circumstances the plaintiff is not entitled to receive Rs. 2,812 per annum on account of interest and costs, which was stipulated to be recovered from the profits of the estate, because no breach of contract took place on the defendants' part."

The Court of first instance framed the following issue on the question as to the amount of interest to be awarded:—"Whether the interest should be allowed at Re. 1-6-0 per cent. on account of the defendants' failure to deliver possession; or whether the delivery of possession did not take place on account of the plaintiff's negligence and laches, and therefore it is unfair to charge interest at a higher rate, and whether this rate being penal should be amended or not?"

Upon this issue the Court held as follows:—

"The actual rate of interest entered in the document is Re 1 and the agreement for payment of interest at Re. 1-6-0 per cent., under special circumstances, is entered in the document in these words:—'If we shall fail to have mutation of names effected or deliver possession at the time of collection, then the mortgagees shall, by rendering null and void all the conditions entered in this document, recover the mortgage-money with interest at Re. 1-6-0 from the date of the execution of this document, before the expiration of the term, by means of a suit.' This rate of interest, *viz.*, Re. 1-6-0 per cent, was to be allowed in case of the defendants' failure to have the mutation of names effected or deliver possession of the mortgaged property, after the mortgage had been made, and the plaintiff's filing a suit for the recovery of the mortgage-money with interest. Then an excessive amount of interest would have been allowed for a short period by way of penalty. According to this condition, the plaintiff is not justified in not suing for nine year

to recover his mortgage-money, after he had not received possession of the property, in order to charge interest for the whole period at the rate of Re. 1-6-0 per cent per mensem instead of Re. 1 per cent, which was agreed upon to be paid partly in cash and partly from the income of the estate. Under these circumstances it is not necessary to inquire now whether the delivery of possession was not made owing to the defendants' default or the plaintiff's negligence. But this conclusion should certainly be deduced from the foregoing facts, that the plaintiff, through his own negligence, failed to take possession, with the object of realizing interest at a higher rate, and therefore, according to the terms of the document he is not entitled to get interest at a higher rate than Re. 1 per cent."

The plaintiff appealed the High Court, contending that the rate of interest claimed, being the contract rate, and reasonable and fair, had been improperly reduced, and that the condition in the mortgage-deed relating to the interest claimed had been misconstrued.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellant.

Mr. *T. Conlan* and Mr. *W. M. Colvin*, for the respondents.

PETHERAM, C J., and STRAIGHT, J.—The only question in this appeal is, whether the creditor is to recover interest on the bond in suit at the rate of Re. 1 or Re. 1-6 per cent. per mensem. The facts of the case are really not disputed, and the question in our opinion turns entirely on the construction of the bond itself. By that, it appears that the plaintiffs and others in the year 1875 lent a sum of Rs. 30,000, at one per cent. per mensem, on the security of a certain property: the bond then contains various provisions which were inserted in the deed for securing payment of interest, all of which were for the benefit of the creditor. *Inter alia*, it was provided that the mortgagee should have possession of the security, and should take the profits on account of interest, the profits being agreed at a certain figure, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the creditor might

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treat the money as immediately due, and recover it at once with interest at the rate of Re 1-6 per mensem.

These provisions were, as we have said before, for the benefit of the creditor, and he was at liberty to waive them if he pleased. What actually happened was, that the creditor did not take possession of the security, and took no steps to obtain such possession, or to recover the money for nine years, during which period no interest has been paid. In our opinion, the fair inference of fact to draw from this state of things is, that the creditor waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, that is, one per cent. per mensem. That rate has been allowed by the Judge, and for these reasons we think that the appeal should, and it is, dismissed with costs.

Appeal dismissed...

1886 *March* 15.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

KHAYALI (DEFENDANT) *v.* HUSAIN BAKHSH AND ANOTHER (PLAINTIFFS).*

Lease—Lease for one year—Lease exceeding one year—Act III of 1877 (*Registration Act*), *ss.* 17 (*d*), 18, (*c*).

A kabuliyat dated the 6th May, 1880, and executed by the lessee of a house in favour of the lessors set forth that the house was let to the former at an annual rent of Rs. 3, for a term of one year. It also contained this stipulation :—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs 7-8 arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3 ; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884 ; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

Held, that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration ; that the defendant had been a mere tenant-at-will since the expiry of the year

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* Second Appeal No. 766 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 6th February, 1885, modifying a decree of Babu Prag Das, Munsif of Kanauj, dated 6th December, 1884.

1880-81; and that the plaintiffs were therefore entitled to possession of the house. *Hand* v. *Hall* (1) referred to

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THE plaintiffs in this case sued the defendant for possession of a house and for Rs. 7-8-0 arrears of rent in respect thereof. The defendant was in possession under a kabuliyat executed by him in favour of the plaintiff and dated the 6th May, 1880. It was set forth in this document that the house was let to the defendant at an annual rent of Rs. 3, for a term of one year. Then followed these words:—"I (the defendant) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court."

The defendant, in answer to the suit, pleaded that according to the right construction of the lease, he was entitled to occupy the house, and the lessors were not entitled to eject him therefrom so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884; that the time for payment of rent for the year 1884-85 had not arrived; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

The Court of first instance (Munsif of Kanauj) construed the lease in the following manner:—"The lease is for one year, but it contains a provision that it shall remain in force so long as the lessee or tenant continues to pay the stipulated rent. In other words, it is a kabuliyat for one year, containing a provision extending the term to more than one year." The Court, upon this view of the lease, held that it was an instrument of which the registration was compulsory under s. 17 (*d*) of the Registration Act of 1877, and that, not having been registered, it was inadmissible in evidence by reason of the provisions of s. 49. The Court accordingly dismissed the suit.

On appeal by the plaintiffs, the Subordinate Judge disagreed with the Munsif upon the construction and effect of the lease, and was of opinion that it was not compulsorily registrable, and therefore inadmissible in evidence because not registered. The Court, after referring to the terms of the instrument, observed:—"It can-

(1) L. R., 2 Ex. D. 355.

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not be considered from these words that a provision has been made in the lease that, so long as the rent continues to be paid, the plaintiffs shall not be at liberty to eject the tenant, or that the lease has become for such a longer period than one year that its registration is compulsory. It is evident that the lease in question in this case is for a term of one year. The case of *Apu Budqavda* v. *Narhari Annajee* (1) has a bearing upon this case. It is held therein that if, in a document for which the term of one year is specially prescribed, any subsequent words are used for the continuance of possession, they are considered to appertain to the future consent of the parties, and cannot in any way affect the actual fixed term or create a fresh right, as based on contract, in favour of any party. Hence the registration of the lease in question cannot be considered to be compulsory, and it cannot be inferred from the lease that there is a mutual contract to the effect that, subject to the condition of paying the annual rent, the defendant has a right to hold possession for ever against the plaintiffs' consent. The lease was for a term of one year, which has expired. The defendant does not deny the fact of his being a tenant. Hence I hold that the plaintiffs are entitled to a decree for possession of the house by ejectment of the defendant, the tenant."

From this decision the defendant appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondents.

OLDFIELD and TYRRELL, J.J.—The lower appellate Court has taken a right view of the lease executed in May of 1880 between the parties.

It was a lease for one year only, and, thus falling under s. 18 of the Registration Act, it was admissible in evidence without registration. The principle laid down in *Hand* v. *Hall* (2) by the Court of Appeal is applicable, and the case cited by the Court below is in point. The appellant therefore has been a mere tenant-at-will since the expiry of the year 1880-81, and the respondents are entitled to the relief accorded to them by the lower appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R., 3 Bom. 21. (2) L. R., 2 Ex. D. 355.

APPELLATE CRIMINAL.

1886
February 5.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* PARMESHAR DAT.

Act XLV of 1860 (*Penal Code*), *s.* 21—*Public servant.*

Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant," within the definition contained in s. 21 of the Penal Code.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *J. Simeon*, for the appellant.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

STRAIGHT, J.—This is an appeal from a decision of the Sessions Judge of Gorakhpur, Mr. R. J. Leeds, dated the 26th September, 1885, convicting the appellant of three offences under s. 420 of the Penal Code of cheating. These offences relate to three aggregate sums of Rs. 455-4-11, Rs. 297-14-3, and Rs. 323-15-4, constituting a very considerable amount of money, which was improperly paid to other persons in consequence of misrepresentations made by the accused. The appellant has also been convicted under s. 167 of the Penal Code, but no sentence has been passed upon him in respect of that section. This latter conviction involves the question whether the accused was a public servant, and subject to the responsibilities attaching to that character. It appears that his duties were as follows:—He was, and had been for several years, attached to the tahsildar's office at Gorakhpur,—*i.e.*, he was employed at the office without receiving any pay, and was learning the duties performed there by the officials, in the hope and expectation of eventually being taken on the staff, and paid like the other persons employed in the office. It seems to me that it is now too late for the contention to be raised on his behalf that he was not a "public servant," within the defini- contained in s. 21 of the Penal Code. I am of opition that any person, whether receiving pay or not, who chooses to

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take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognized as filling the position of a public servant, must be regarded as one, and that is does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a public servant. If such a contention were allowed, and the question whether a man was a public servant were to depend wholly upon the test of his receiving or not receiving a salary, very great mischief and difficulty might arise in a country like this, where numerous persons are engaged in the performance of public duties without pay. I am therefore of opinion that the appellant must be regarded as coming within the definition of "public servant." This disposes of the first objection which has been taken on the appellant's behalf. I will now briefly state the circumstances under which the accused has been convicted. It appears that the military authorities, for purposes of convenience, made an arrangement with the Collector of Gorakhpur, by which the latter should ascertain every month, through the tahsildar's office, what were the current rates in the bazar for grain and other articles of food; and in the ordinary course of business it was the accused's duty to prepare an average list of such rates in Persian, which he had to take to Mr. Augustin, in the Collector's office, and to read out to him from the Persian list the figures of the rates. From this Mr. Augustin made a list in English for the Collector, who forwarded it to the commanding officer of the regiment, who, upon the basis of the list so prepared, directed payment from time to time to the banias supplying the articles of food required. So that, if by any arrangement with any persons in the bazar the accused chose to make incorrect statements as to the amount of the rates of food to Mr. Augustin, the list prepared by Mr. Augustin upon such statements would necessarily be incorrect also, and this would result in larger sums being paid to the banias than they were entitled to receive. I cannot conceive circumstances more clearly within the meaning of s. 420 of the Penal Code. It has been proved that the Persian list of averages prepared by the accused was correct, and Mr. Augustin has shown that his English list was prepared with reference to the

translation of the Persian list given to him by the accused. A comparison of the two documents makes it obvious that the appellant misrepresented the contents of the Persian list, because in Mr. Augustin's list there was a large excess in the alleged prices. The case is overwhelming, and I must dismiss the appeal.

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Conviction affirmed.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

1886 *February* 13.

JIWAN ALI BEG (APPLICANT) *v.* BASA MAL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, s. 549—Practice—Appeal—Security for costs—Poverty of appellant.

Held by the Full Bench (TYRRELL, J., *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

THIS was an application by the respondent in First Appeal No. 133 of 1885 for security for costs which came on for hearing before Straight, J., who made the following order of reference to the Full Bench:—

"This is an application by the respondent in an appeal to this Court, that the appellant, who was unsuccessful in the Court below, be ordered to give security for the costs incurred, not only in that Court, but in this appeal. The allegation of the respondent in his petition, and vouched by affidavits, is that the appellant is a person without means, and indeed I understand the appellant's counsel to admit that, so far as he is aware, except the property which is the subject-matter of the present suit, and which was hypothecated in the bond sued upon, the appellant possesses no property whatever. Under these circumstances, the respondent urges that the appellant be required to furnish security. It has been ruled on three occasions in this Court—twice by myself (1)

* Miscellaneous Application in F. A. No. 133 of 1885.

(1) *Dalip Singh* v. *Azim Ali Khan* and *Bachman* v. *Bachman*, Weekly Notes, 1884, pp. 99 and 103 respectively.

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and once by Mr. Justice Mahmood (1)—that mere poverty alone is not a sufficient ground for requiring security for costs from an appellant, and I have certainly been under the impression that that was the recognised rule in the English Courts, which also has been followed by the Bombay High Court in *Maneckji Limji Mancherji* v. *Goolbai* (2). Mr. *Hill* has, however, called my attention to two rulings of the Court of Appeal in England, which seem at least to modify the old decisions, and to show that poverty or insolvency is a good ground for requiring security for costs from the appellant. As the question is one of practice, and of considerable importance to those engaged in appeals in this Court, I refer it to the Full Bench for determination"

Mr. *C. H. Hill*, for the petitioner, referred to *Harlock* v. *Ashberry* 3) and *Farrer* v. *Lacy, Hartland & Co.* (4).

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the opposite parties.

STRAIGHT, J.—We are unable to lay down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed; but we may go so far as to say that the mere fact of the poverty of an appellant, standing by itself, and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

PETHERAM, C. J., and OLDFIELD and BRODHURST, JJ., concurred.

TYRRELL, J.—S. 549 of the Code prescribes no conditions which absolutely entitle a respondent to an order under the terms of that section requiring the appellant to furnish security for the costs of the appeal; and I should hesitate to import into the provisions of the section any rule either way upon the question whether or not the poverty of an appellant by itself justifies an order requiring him to furnish security for costs.

(1) *Lakhmi Chand* v. *Gatto Bai*, I. L. R., 7 All. 542.

(2) I. L. R., 3 Bom. 227.

(3) L. R., 19 Ch. D. 84.

(4) L. R., 23 Ch. D. 482.

APPELLATE CIVIL.

1886
March 8.

Before Sir Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

BASA MAL AND ANOTHER (DEFENDANTS) *v.* MAHARAJ SINGH, MINOR, BY HIS NEXT FRIEND, SARUP KUAR (PLAINTIFF)*.

Hindu law—Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.

When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i.e.*, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder.

Girdharee Lall v. *Kantoo Lall* (1), *Deendyal Lall* v. *Jugdeep Narain Singh* (2), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3), *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (4), *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (5), *Burdey Narain Sahu* v. *Rooder Perkash Misser* (6), *Nanomi Babuasin* v. *Modun Mohun* (7), *Ram Narain Lal* v. *Bhawani Prasad* (8), *Gaura* v. *Nanak Chand* (9), *Appovier* v. *Rama Subba Aiyan* (10), *Phul Chand* v. *Man Singh* (11), *Chamaili Kuar* v. *Ram Prasad* (12), and *Rama Nand Singh* v. *Gobind Singh* (13), referred to.

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* First Appeal No. 66 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 23rd November, 1883.

(1) 14 B. L. R. 187; 22 W. R., 56; L. R. 1 Ind. Ap. 321.
(2) I. L. R. 3 Calc. 198; L. R., 4 Ind. Ap. 247.
(3) I. L. R. 5 Calc. 148; L. R., 6 Ind. Ap. 88.
(4) 5 Calc. L. R. 477; L. R. 6 Ind. Ap 233.
(5) I. L. R. 6 Mad. 1; L. R. 9 Ind. Ap. 128.
(6) I. L. R., 10 Calc. 626; L. R., 11 Ind. Ap. 26.
(7) Decided by the Privy Council on the 18th December, 1885.
(8) I. L. R, 3 All. 443.
(9) Weekly Notes, 1883, p. 194, and Weekly Notes, 1884, p. 23.
(10) 11 Moo. I. A. 75.
(11) I. L R., 4 All. 309.
(12) I. L. R., 2 All. 267.
(13) I. L. R., 5 All. 384.

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THIS was an appeal from a decree of the Subordinate Judge of Moradabad, dated the 23rd November, 1883, which came before Petheram, C.J., and Straight J., and was referred by them to the Full Bench. The order of reference, in which the facts are fully stated, was in the following terms: —

"In this suit the minor plaintiff, by his mother and guardian, sued for a declaration of his right to possession of 2½ biswas shares in two mahals of Kasba Mughalpur, and for the cancelment of a miscellaneous order of the 2nd of February, 1883, under the following circumstances :—The plaintiff alleges that his father, Chaudhri Sheoraj Singh, upon the death of his grandfather, Chaudhri Bhan Partab Singh, inherited certain valuable properties, among which were the mahals in suit; that subsequently his said father, having, by his 'immoral and licentious life,' wasted and squandered the income derivable from the ancestral properties, was, on the 9th of July, 1878, obliged to borrow Rs. 3,000 from the defendants, and mortgaged in their favour the shares in Mughalpur already mentioned; that the said defendants, in the year 1879, instituted a suit on their bond against the said Sheoraj Singh; that the plaintiff, by his guardian, prayed the Court in which such suit was pending to make him a party thereto under s 32 of the Code; that his application was rejected and a decree was given in favour of the defendants against Sheoraj Singh on the 20th June, 1879; that the shares in Mughalpur were first brought to sale in execution of that decree in May, 1880; that subsequently to such sale the plaintiff filed an application to have it set aside, but it was refused, though the sale was ultimately set aside at the instance of the judgment-debtor; that the defendant Basa Mal and one Ganeshi Mal, representative of Sita Mal, the other decree-holder, having brought the mortgaged property to sale a second time, on the 21st November, 1881, purchased it for Rs. 2,000; that the plaintiff thereupon urged objections to possession being given to the said auction-purchasers and opposed it, and the latter then filed an application to the Court under s 335 of the Code, and on the 2nd February, 1883, such application was decided in favour of the auction-purchasers, Basa Mal and Ganeshi Mal, and they were ordered to be put in possession; that this order gave the plaintiff the cause of action on which he now sues; and that Sheoraj Singh, being joint with the

plaintiff, had no power to charge the joint property, and such charge was void and of no effect as to the whole. The defence set up was, in substance, that the property was not ancestral, that the bond was executed for necessary purposes, and that Sheoraj Singh, as guardian of and manager for his minor son, the plaintiff, was competent to make the charge.

"The Subordinate Judge, finding that the debt to the defendants under the bond was incurred for immoral purposes, and that the property was ancestral, gave a decree in the plaintiff's favour for half his claim. From that decision the defendants have appealed to this Court, and the plaintiff has filed one objection. The pleas before us were, that the debt to the defendants was incurred for legitimate purposes; that the plaintiff failed to establish, as he was bound to do, that the amount borrowed from the defendants was used for immoral purposes; that the facts show that the present suit is instituted with the connivance and at the instigation of Sheoraj Singh. The plaintiff's objection, on the other hand, is to the effect that the Subordinate Judge should have decreed his claim in whole and not in part. As the case is one involving considerations akin to those that have arisen in another case referred to the Full Bench, we think this should also go. In making the reference we find, as a fact, that the property was ancestral; that the plaintiff is in possession of it; that there is evidence to show that, though a considerable portion of the bond-money advanced on the bond of the 9th July, 1878, to Sheoraj Singh, was required for a necessary purpose, namely, the payment of revenue, he had got himself into the position of having to take a loan by reason of his imprudent and extravagant proceedings, and that the defendants purchased with notice of the plaintiff's claim. Upon these findings we refer the appeal to the Full Bench for disposal."

The Full Bench, however, did not dispose of the appeal, but, without expressing any opinion in regard to it, returned it to the Divisional Bench for determination. The appeal was then heard by the Divisional Bench.

Pandit *Bishambar Nath*, for the appellants.

Lala *Juala Prasad*, for the respondent.

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PETHERAM, C. J., and STRAIGHT, J.—The circumstance of this case are set out at length in the order by which the appeal was originally referred to the Full Bench for decision, and they need not be recapitulated. The matter now has come back to us for decision, for reasons that need not be detailed, and, before disposing of it, we think it desirable briefly to refer to certain decisions of their Lordships of the Privy Council, which were commented upon in the course of the arguments, as also some rulings of this Court, with a view to ascertain what are the clear and intelligible rules to be applied in the determination of these cases of a Hindu son seeking to avoid an alienation of joint ancestral property by his father. At the outset, and by way of introduction to the consideration of the subject, the description given by Lord Westbury of the characteristics of the joint Hindu family may be usefully quoted:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he (that particular member) has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment by the members of an undivided family"—*Appovier* v. *Rama Subba Aiyan* (1). In this connection it will be convenient to refer to the principle laid down in *Phul Chand* v. *Man Singh* (2) by Straight and Tyrrell, JJ., "that every son born to the father of a joint Hindu family in possession of ancestral property acquires a positive, though undefined, share in the joint estate co-extensive with and as large as that of all the other members of the joint family, including his father, and that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property." It has further been the rule of decision in this Court [see Oldfield, J., in *Chamaili Kuar* v. *Ram Prasad* (3), and Straight and Brodhurst, JJ. in *Rama Nand Singh* v. *Gobind Singh* (4)] that one member of a joint and undivided Hindu family cannot mortgage or sell his share of the joint property without the

(1) 11 Moo. I. A. 75
(2) I. L. R., 4 All. 309.
(3) I. L. R., 2 All 267.
(4) I. L. R., 5 All. 384.

consent, express or implied, of his co-parceners. These rulings may be said to state the most important incidents that mark the relations of the members of the joint Hindu family *inter se*; and we now proceed to ascertain how far those relations have been touched or modified in reference to transactions between the father of the joint family, its natural head and manager, and third parties by which the joint ancestral property has been mortgaged or sold.

The first important decision of the Privy Council on the question of the power of the father of such a family to deal with the joint ancestral estate is to be found in the case of *Girdharee Lall* v. *Kantoo Lall* (1). This was an action by a son in the lifetime of his father and uncle to set aside a sale of ancestral property made by them, on the ground that a sale by one member of an undivided property passes no interest in it whatever, and that any other member of the family can set it aside and bring the property back into the family. The Privy Council dismissed the suit, on the ground that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The next case is that of *Deendyal Lall* v. *Jugdeep Narain Singh* (2). That was a suit by a son to recover possession of ancestral property which had been taken possession of by an auction-purchaser of "the rights and proprietary and mokurrari title and share of Tufani Singh, the judgment-debtor," who was the father of the plaintiff. The Privy Council decreed the claim, on the ground that possession of the undivided property could not be taken under a sale of one undivided share, but gave the defendant a declaration that he was entitled to stand in the shoes of Tufani Singh, and to obtain a share of the property by bringing a suit for partition. The judgment contains an expression of opinion that only the undivided share of the father can be sold in a suit to which he only is made a defendant; but inasmuch as the defendant in that suit had only bought the

(1) 14 B. L. R. 187; 22 W. R 56; L. R. 1 Ind. Ap 321.

(2) I. L. R., 3 Calc. 198; L R., 4 Ind. Ap. 247.

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interest of the father, the point was not necessary for the decision of the case. The next case is that of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). A family, consisting of a father and his minor sons, was in possession of an ancestral estate, and the father mortgaged the estate to secure a sum of Rs. 13,000 and interest, which he had himself borrowed for and spent in immoral purposes. The Privy Council held, on the authority of the case of *Deendyal Lall* (2), that the purchases under a decree on the mortgage security after the death of the father were cancelled as against the surviving sons, who had a right to have the estate partitioned and to obtain possession of the share of the father, and that the mortgage and the decree upon it would not affect the undivided share of the other members of the family *because the money was borrowed and spent for immoral purposes.* In the course of the judgment, they affirmed the following propositions as being established by the case of *Kantoo Lall* (3): "first, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not had notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceeding."

The case of *Bissessur Lall Sahu* v. *Maharajah Luchmessur Singh* (4) has been referred to, but on examination does not appear to have any bearing on the questions. In that case, an undivided family acquired, in 1847, the property which was in question, and afterwards decrees were obtained against various members of the family for debts which were undoubtedly debts for which the whole family was liable, and for which they might have been sued, and the family property been sold, had proper proceedings been

(1) I. L R, 5 Calc. 148; L. R, 6 Ind. Ap. 88.
(2) I L R, 3 Calc. 198, L. R., 4 Ind. Ap 247.
(3) 14 B L. R, 187; 22 W. R 56; L. R., 1 Ind Ap. 321.
(4) 5 Calc. L. R. 477; L R. 6 Ind. Ap 233.

taken. The Privy Council held in that case that the Court might look behind the decrees to ascertain whether the defendant was sued in his individual character or as the representative of the entire family, and that the execution should be in accordance with the real facts, and not necessarily against the property of the apparent defendant only. The next case in order is that of *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (1). The facts of that case are complicated, and it is not easy to gather from the report exactly what they were; but it is clear that the main question was, whether a property (that at the time of the mortgage was in the possession of a family which consisted of a father and son) mortgaged by the father alone could be sold after the death of the father under a decree obtained against him alone upon the mortgage. The Privy Council held that it could, the reasons given being that the whole zamindari, or at least the interest which the defendant, the son, took therein by heritage, was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts, and the Committee re-affirmed the doctrine laid down in *Girdharee Lall's Case*. The next and last decision of the Privy Council on the subject is contained in the case of *Hurdey Narain Sahu* v. *Rooder Perkash Misser* (2). In that case an ancestral property was in the possession of a family which consisted of a father and son. It appeared that the father was indebted to the defendant in the suit of Hurdey Narain, partly on account of a mortgage and partly for further advances, and that Hurdey Narain brought a suit against him in order to recover the debt, and on the 4th of March, 1873, obtained a common money-decree against him, and that the ancestral property was afterwards attached and sold under the decree, and purchased by Hurdey Narain, the judgment-creditor.

Under these circumstances the Privy Council say that the question which arises is, what was the right or interest in the ancestral property which Hurdey Narain acquired by his purchase at the sale in execution of the decree, and upon the authority of *Deendyal's Case* they held that as the decree was against the father alone,

(1) I. L. R., 6 Mad. 1; L. R., 9 Ind. Ap. 128.

(2) I. L. R., 10 Calc. 626; L. R. 11 Ind Ap 26.

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and was a money-decree only, such interest was confined to that of the judgment-debtor, the father, only and did not transfer the entire property to the purchaser. There is yet one more case recently decided by their Lordships, and not yet reported, namely, *Nanomi Babuasin* v. *Modun Mohun* (1), on appeal from Calcutta. There two sons sued to avoid a sale of the ancestral property held in execution of a decree against their father. The Subordinate Judge in whose Court the suit was tried found that all that had passed at the auction-sale to the purchaser was the right, title, and interest of the father, and he therefore gave the plaintiffs a decree for the ancestral property *minus* the father's share. On appeal the High Court reversed the decision of the Subordinate Judge, holding that the auction-purchaser bought the whole property, including the interests of the plaintiffs. The latter then appealed to the Privy Council, and their Lordships, after referring to *Deendyal Lall's Case*, observed :—" If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone, the absence of the sons from the proceeding may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the result their Lordships held that, as the purchaser had succeeded in showing that he bought the entirety of the estate, the suit of the plaintiffs had been rightly held to have failed.

We now come to the cases which have been considered in the High Court of these Provinces. That of *Ram Narain Lal* v. *Bhawani Prasad* (2) was decided by the Full Bench of this Court on the 24th January, 1881, that is to say, after that of *Bissessur Lall Sahu* and before that of *Hurdey Narain Sahu* v. *Rooder Perkash Misser* (3). In that case the facts were, that an ancestral estate was in the possession of an undivided family which consisted of a father and four sons. The father borrowed a sum of money, and as security gave a bond by which he hypothecated a

(1) Decided the 18th December, 1885.
(2) I. L. R., 3 All. 443.
(3) I. L. R., 10 Calc. 626; L. R., 11 Ind. Ap. 26.

portion of the ancestral estate, describing it as his own. The lender afterwards sued the father on the bond and obtained a decree against him personally and for the sale of the mortgaged property. A sale took place under the decree, and the question was what passed to the purchaser. The majority of the Court (Stuart, C.J., Pearson, Spankie, and Oldfield, JJ.) held on the authority of *Bissessur Lall Sahu's Case*, that it was competent for the Court to go behind the decree, and to ascertain whether the money was borrowed for family purposes, and, upon its appearing that such was the case, to sell the family property under it. Straight, J., thought that as the decree was against the father alone, his share only could be sold under it. Another case is that of *Gaura* v. *Nanak Chand* (1). The only question in that case was on whom the burden of proof rested, when it was alleged that the property had been parted with by the father for unauthorized purposes, and the Court held that the burden of proving the assertion was on the person who made it; in other words, that the transaction would be presumed to be a legal and proper one until the contrary appeared.

It seems to us that two broad rules are deducible from the foregoing authorities, and they are these:—First, that when a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter I, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge. Next, that if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution

(1) Weekly Notes, 1883, p. 194, and Weekly Notes, 1884, p 23.

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is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i. e.*, the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder.

Applying these rules to this appeal, we are of opinion that it must succeed, and that the decree of the Subordinate Judge cannot stand. That the 2½ biswas share of Mughalpur was sold at the execution-sale under the decree obtained against Sheoraj Singh and purchased by the defendants is clear from the terms of the decree and of the sale-certificate, and there can be no doubt that the entirety of the interest passed to them. The plaintiff has failed to show that the debt for which the bond was executed was an immoral one; indeed, a considerable proportion of the money borrowed was used for the purpose of paying arrears of revenue. We decree the appeal and dismiss the cross-objection, and, reversing the decree of the Subordinate Judge, we dismiss the suit with costs in all Courts.

Appeal allowed.

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Before Sir Comer Petheram, Kt, Chief Justice, and Mr. Justice Straight.

DHUM SINGH (DEFENDANT) *v* GANGA RAM AND OTHERS (PLAINTIFFS).*

Vendor and purchaser—Failure of consideration—Suit for money had and received for plaintiff's use—Debt—Limitation.

Prior to September, 1879, pecuniary dealings took place between *D* and *B*, resulting in a debt due by the former to the latter of Rs. 33,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September, 1879, it was arranged that *D* should execute a sale-deed conveying to *B* certain immoveable property for Rs. 55,000, and that *B* should pay this amount by giving *D* credit to the extent of the debt and paying the balance in cash. In August, 1880, *D* sued *B* for specific performance of the contract, which, he alleged, had been settled and executed, for the sale of the property. *B* in defence alleged that although certain

* First Appeal No. 62 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 26th March, 1885.

terms and conditions as to the sale had been definitely settled for embodiment in a formal sale-deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by *D* on the 1st September 1879, he had never accepted that document. In March, 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the contract alleged by *D*, and that the document of the 1st September, 1879, had never been finally accepted so as to be binding and enforceable by law. In September, 1884, *B* sued *D* for recovery of the sum of Rs. 33,000 with interest. He contended that, under the terms of the arrangement made on the 1st September, 1879, the debt of Rs. 33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but, having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March, 1884, dismissing the suit for specific performance

Held that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by the terms of the agreement itself which the plaintiff set up, no deposit was payable, and the price was not to be paid till the completion of the contract, and inasmuch as the plaintiff, in demanding payment, after the negotiations had failed, demanded it simply as for the balance of the old debt, and not as for the return of a deposit.

Held, further, that the 1st September, 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 18th September, 1884, it was barred by limitation.

THE facts of this case were as follows:—On the 1st September, 1879, Dhum Singh, defendant, was indebted to one Baru Mal in the sum of Rs. 33,359-3-6 for money lent. On the same date Dhum Singh executed a deed of sale whereby he conveyed to Musammat Basu, the wife of Baru Mal, a village called Tailipura and certain shares in nine other villages, in consideration of the payment of Rs. 55,000. On the same day the deed was delivered to Baru Mal, and at the time of its delivery he gave Dhum Singh a letter in the following terms:—

"Baru Mal begs to send his compliments to Dhum Singh. I have for the present kept with me the sale-deed of mauza Tailipura, &c., in all ten villages, for Rs. 55,000. It will be registered to-morrow. Rs. 21,640-12-6, due to you on account of this sale-deed, after setting off Rs. 33,359-3-6, will be paid as follows:—Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 after mutati.n of names has been effected."

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The sum of Rs. 33,359-3-6 mentioned in this letter as set-off against the purchase-money was the amount mentioned above as due to Baru Mal from Dhum Singh for money lent

On the same day Dhum Singh credited and debited in his account-books to Baru Mal the sum of Rs. 33,359-3-6, the entries being in these terms :—

"Credited to Sah Baru Mal Rs. 33,359-3-6. Rs. 33,359 3-6 were due to Sah Baru Mal on account of the balance under the account-books. In the sale-deed for Rs. 55,000 credit was allowed for the same amount with reference to your letter.

Debited to Sah Baru Mal Rs. 33,359 3 6 Rs. 33,359 3-6 were due to you on account of balance under the account-books The same have been paid off and credited to Sah Baru Mal in respect of the sale-deed amounting to Rs. 55,000 "

Dhum Singh also balanced his account with Baru Mal, and debited him with Rs. 21,640-12-6, being the balance of the purchase-money. This entry continued to be made in his account-books from year to year, and was existing at the time of the institution of the suit out of which this appeal arose. In the account-books of Baru Mal the sum of Rs. 33,359-3-6 continued to be debited, with interest, to Dhum Singh, and was so debited at that time.

On the 29th September, 1879, Baru Mal, having in the meantime refused to accept the sale-deed, sent a letter to Dhum Singh in these terms :—

"As you have not yet replied to my several oral messages, I am obliged to give you notice hereby, that instead of the sale-deed of the 1st September, which your manager, with intent to cause loss to me, has executed in my favour, altering the wording of the rough draft and omitting the conditions necessary to the sale, and which is on account of this defect, useless and a piece of waste paper, you will execute, within four days, a correct and faultless sale deed in respect of Tailipura, &c, the sold villages, on another stamped paper, specifying all the conditions agreed upon between us, in accordance with my rough draft, to a letter, and after due registration cause mutation of names to be effected in my favour respecting the property sold If you will not do so, I will, after the expiry of the said term, be entitled to recover, according to the banking usage, the custom of the country, the court practice, and justice, besides Rs 33, 359 3 6, the balance in my favour, on the account books, a further sum of Rs 1,500 as damages for the loss sustained by me on account of your fraudulent proceedings mentioned above. This is written to you by way of information You are at liberty either to act as above and deal fairly, or let the term expire and choose to pay Rs. 1,500 as damages, besides the above mentioned debt. Please send a reply, as you desire, by return of post. If you will not send a reply within the term, I will

assume you have accepted to pay Rs. 1,500 as damages in addition to the debt due to me."

The dispute between the parties was referred to arbitration, but no arbitration took place, and on the 3rd August, 1880, Dhum Singh sued Baru Mal and his wife Basu for specific performance of the contract represented by the sale-deed executed by him. The principal relief which he sought in that suit was as follows :—

"That after declaring the sale transaction and sale-deed in respect of the aforesaid villages to have been established and completed, the defendant be ordered to have the said deed registered within a reasonable date from the date of the order, and after deduction of Rs. 33,359-3-6, the amount of debt due to him (defendant), to pay Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 at the time of mutation of names, to the plaintiff, and in case defendant No. 1 fails to comply with the aforesaid order for having the registration and mutation of names effected within the term granted by the Court, he may be ordered to pay Rs. 21,640-12 6 in a lump sum to the plaintiff."

The case of Dhum Singh was that the sale-deed executed by him on the 1st September, 1879, had been accepted by Baru Mal on that day.

The defence of Baru Mal was that it had been agreed between the parties that the sale-deed should be drawn in the terms of a draft prepared by his karinda ; that he had not accepted the sale-deed executed by Dhum Singh on the 1st September, 1879, but had received it in order that he might compare it with the rough draft, and satisfy himself that the deed corresponded with the draft before he accepted the deed ; that as the deed did not correspond with the draft, he had refused to accept it ; and that under the circumstances he was not bound to accept it.

The Subordinate Judge of Saháranpur (Maulvi Muhammad Maksud Ali Khan), by whom the suit was tried, on the 24th February, 1881, holding that the sale-deed executed by Dhum Singh on the 1st September, 1879, represented the contract of sale, gave him a decree as claimed.

Baru Mal appealed to the High Court, which, on the 14th March, 1884, reversed the decree of the lower Court and dismissed the suit. The judgment of the High Court (Straight and Tyrrell, JJ.) was in these terms :—

"This is an appeal from a decision of the Subordinate Judge of Saháranpur, passed on the 24th of February, 1881, decreeing

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the plaintiff-respondent's suit for specific performance of an alleged contract of the 1st September, 1879, relating to the sale to, and purchase by, the defendant-appellant Baru Mal of certain shares of villages in the Sahâranpur district. The plaintiff Dhum Singh and the defendant Baru Mal are Mahajans (Saraogis) carrying on their business at Sahâranpur, and Musammat Basu, the 2nd defendant, is the wife of defendant No. 1. Dhum Singh and Baru Mal are related by marriage, and down to the time of the transaction, out of which the present litigation has arisen, would seem to have been on friendly terms. It appears that prior to the month of August, 1879, there had been considerable pecuniary dealings between the plaintiff and Baru Mal, whom we shall for the future call *the* defendant, which at that date had resulted in an indebtedness from the former to the latter, in round numbers, of some Rs. 33,000. According to the defendant's own account, his son, Ajit Singh, objected to so large a debt remaining outstanding, and, in consequence of this, negotiations were commenced with a view to effecting some settlement, upon the basis that, among other incidents of the arrangement to be come to, the plaintiff should transfer his proprietary interests in certain villages to the defendant's wife. We are not for the moment concerned to inquire into the details of what passed in the course of these preliminaries; it is enough for immediate purposes to say that on the 1st of September, 1879, a deed was executed by the plaintiff, purporting, in lieu of a debt due from him of Rs. 33,359-3-6, which was to be written off as satisfied, and for a cash payment of Rs. 21,640-12-6, to convey all his rights in ten mauzas therein specified to Musammat Basu, wife of Baru Mal. This is the instrument specific performance whereof is sought by the suit now before us in appeal, which was instituted on the 3rd of August, 1880. The main plea set up by the defendant in the Court below was to the effect that, in the course of the negotiations above adverted to, certain terms and conditions, which for the moment need not be more particularly mentioned, had been arranged between the parties for embodiment in a formal sale-deed; that it was only upon these terms and conditions that the defendant was prepared to complete the transaction; that those terms and conditions were intentionally and fraudulently omitted from the document

executed by the defendant on the 1st September, 1879; and that the defendant never finally accepted that document as then drawn up so as to make it a valid and binding contract and enforceable in law. There were other pleas relating to certain arbitration proceedings, which were commenced under agreement between the parties, and to a demand made by the plaintiff for damages, with which we need not concern ourselves.

"The Subordinate Judge decreed the plaintiff's claim for specific performance, but dismissed it as to the damages; and the defendants appeal.

"Four contentions were urged before us on their behalf. First, that looking to the prayer of the plaint and the fact that the sale-deed of the 1st of September, 1879, was made in the favour of the defendant Musammat Basu, no decree could legally be passed against the defendant Baru Mal specifically to perform the same; second, that the parties having referred their differences to arbitration by an agreement of the 15th December, 1879, the suit was barred by the latter part of the proviso to s. 21 of the Specific Relief Act; third, that there never was any completed and final contract between the parties binding on the defendant, of which specific performance could properly be granted; fourth, that even if there was a valid contract, it was so vague and indefinite in its terms as not to warrant the Court below in exercising the discretionary powers conferred by Act I of 1877.

"In the view we take of the case, it will be more convenient at once to discuss and deal with the third of the above grounds taken by the appellants, as it virtually comprehends and directly affects all the material questions in difference between the parties. It goes without saying that, if there was no absolute and unqualified acceptance of the terms of the contract of September, 1879, by the defendant, there was no contract which can be specifically enforced. Was there then such an acceptance in fact? Before entering, however, upon an examination of the evidence, we feel ourselves constrained to remark, as we did at the hearing, that it is matter for regret to find that a dispute between two native gentlemen of position and related to one another, which might easily have been amicably arranged, should have developed into such an embittered controversy.

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It is to our minds most unfortunate that our consideration of what otherwise would have been a simple question of fact is complicated and embarrassed by recriminatory charges of bad faith, deceit, misrepresentation and fraud, and we cannot but regret that the efforts we felt ourselves justified in making to induce them to abandon their several imputations, and to compromise the dispute, should have proved unsuccessful. With this much by way of parenthesis we now revert to a consideration of the question of whether the defendant gave such an unqualified and absolute acceptance to the terms of the instrument of the 1st of September, 1879, as to constitute it a contract enforceable against him. After going very carefully into the whole of the evidence, on the one side and the other, and with the strongest indisposition to differ with so experienced and intelligent a judicial officer as the Subordinate Judge upon matters of fact, we find ourselves unable to agree in the conclusions he has arrived at upon this part of the case. The story told by the plaintiff and his witnesses as to what occurred on the 1st of September prior to, at the time of, and after, the execution of the sale-deed seems to us to present many improbabilities. For example, it is scarcely credible that a wealthy gentleman in the position of the defendant, with karindas and agents to attend to such matters for him, would have subjected himself to the trouble and labour of reading out the draft "word by word" to the copyist of the sale-deed, and again when the copy had been completed of comparing it with the original draft. The plaintiff would have us believe that the sale-transaction was of the most ordinary and simple description. What necessity then was there for the plaintiff to adopt such very unusual and exceptional precautions? and, as far as we can see, it is not pretended that down to the time of the defendant's going to the house of the plaintiff, on the 1st of September, there had been any serious hitch or difficulty over the arrangement of the preliminaries, and we may we think fairly assume that, when he went there, it was with the full intention of completing the transaction. We cannot believe that his presence on the occasion in question was a cunning pretence and deceit on his part, resorted to for the purpose of getting out of his moral obligations towards the plaintiff's purchase on the conditions already settled. It comes to this, therefore, that the defendant was then ready and willing to close with the

plaintiff. But did he do so? The answer must we think be unhesitatingly in the negative. It is admitted that the defendant was allowed to take the sale-deed away with him; in fact, it has been produced in the suit from his custody. That there was something exceptional in this mode of proceeding is clearly indicated by the fact that the letter to be found on page 1 of the respondent's book was required by the plaintiff and given by the defendant. Under ordinary circumstances, the instrument would have remained with the vendor at any rate until the transaction had been perfected to the extent of registration, and the receipt of the Rs. 10,000 in cash to be paid thereon. What cause then was there for so unusual a course to be pursued as that which we find to have been adopted in the present case? For while, on the one hand, no reason of any sort is assigned by the plaintiff for this departure from ordinary practice, on the other, the defendant says that, before according his final assent to the sale-deed, he wished to have it compared with the draft in the hands of his karinda Partab Singh and took it away with him for that purpose. We confess that this appears to us to be a rational and natural explanation. For it must be remembered that, at that time, the plaintiff and defendant were upon perfectly amicable terms, and while, as a matter of business, the latter might, without offence, have wished, for his own protection, that his agent should examine the document by the rough draft, his saying so would have been a breach of manners, of which one native gentleman would hardly have been likely to be guilty towards another. If, as the plaintiff asks us to believe, the contract had been finally and irrevocably concluded by the defendant, it is difficult to understand why the former should have allowed the document embodying it to go out of his possession, still more why the latter should have wanted it at such a late hour of the night, when it was understood that the parties were to meet at the registration office on the following day. It does not seem to be suggested that the defendant then had it in his mind to wriggle out of the transaction; on the contrary, as we understand the plaintiff's allegation, it was not till after this that the defendant's sons brought pressure to bear upon their father to repudiate the contract. If the defendant had given the absolute and unqualified assent which is now alleged, we should not, in the ordinary nature of things, have found him

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carrying off the instrument with him and giving by way of acknowledgment such a letter as that of the 1st September. It was pressed upon us by the counsel for the plaintiff, that it was in the highest degree improbable that the defendant would have allowed a Rs. 500 stamp to be wasted, and that he must have assured himself as to the terms of the contract before it was committed to stamp paper. It is enough to say, in answer to this, that the plaintiff himself states that he had agreed to find the stamp, and there was therefore no reason for the defendant to concern himself on that score. With regard to the evidence of the defendant and Bahal Singh as to the conduct of the scribe Shaikh Bakhsha, we cannot adopt the Subordinate Judge's view that it has been invented for the purposes of this case; nor do we think that the statements of Kishen Lal, Khushi Ram, and Karta Kishen, which go to corroborate their account of the matter, should be summarily discredited simply because these persons are intimate friends of the defendant and his sons. Shaikh Bakhsha is unfortunately dead, and we have no materials to hand which would justify us in forming any presumptions as to whether, if he had been called, he would or would not have corroborated the plaintiff's story. So again we have not before us the draft from which the sale-deed is said to have been faired out, and its absence is accounted for by an assertion on the part of the plaintiff and his witnesses that it was destroyed on the 1st of September at the instance of the defendant. We find it hard to believe this statement, which credits the plaintiff with a want of the most ordinary prudence and caution, not to be expected from a man of business. Nor is it intelligible why the defendant, who, according to the plaintiff, was then perfectly satisfied with the contract, should have concerned himself about the draft. We confess that we view this part of the evidence for the plaintiff as gravely suspicious, and the impression it leaves upon our minds is unfavourable. If then the draft, which was admittedly supplied by the defendant to the plaintiff, was not destroyed, which we seriously doubt, what has become of it, and why is it not produced? The answer is so obvious that we need not pursue the matter further.

"So far we have been dealing with the circumstances more directly relating to what transpired on the 1st of September, and,

regarding them as a whole, we think that all the probabilities point in favour of the version which is given by the defendant and his witnesses. We now pass to the consideration of the conduct of the parties subsequently to that date. It is said by the plaintiff that the motive of the defendant's repudiation of the contract was that his sons objected to the sale-deed being in their mother's name, and in consequence brought pressure to bear upon their father. Except a very vague statement on the part of the tahsildar Narain Singh, which of itself is insufficient to justify any such inference, we have no material to warrant our concluding that such was the case.

"The negociation had been going on during the month of August, and both of the defendant's sons were apparently familiar with the mode in which it was proposed the sale transaction should be carried out. If their influence with the defendant was as great as is suggested, they could as readily have brought it to bear before the 1st of September as afterwards, and if, as seems to be hinted, the defendant thought he had made such a good bargain, it is scarcely probable that he would at the last moment have thrown it up at the instance of his sons. While on the one hand the plaintiff's allegations in this respect appear to us to have no substantial foundation, in reason or fact, the defendant's explanation on the other seems perfectly rational and probable. Before attending at the registration of the sale-deed, and paying over hard cash to the amount of Rs. 10,000, he wished to assure himself that the terms of the document were in harmony with the rough draft that had been retained by his karinda, Partab Singh. What could be more natural? It was not likely he should say to the plaintiff in terms: 'Your scribe Bakhsha is well known to be a cunning person, and I should like to make sure that he has not played me any tricks," for to have done so would, according to our knowledge of native habits, have been a grave breach of politeness. But he might well have wished, as he says he did, to take away the sale-deed with him for the purpose of ascertaining whether all the conditions agreed upon had been entered. The Subordinate Judge, in reference to this part of the defendant's case, rejects the rough draft-deed produced by Partab Singh as fabricated and fictitious, and thus virtually convicts the witnesses Partab Singh

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and Khushi Ram of deliberate perjury and the defendant of abetting the fabrication of false evidence. We cannot agree in his conclusions, nor do we regard the reason given for them as sufficient. In his letter to the plaintiff of the 27th of September, 1879, the defendant speaks of 'the wordings of the rough draft having been altered.' If we understand the Subordinate Judge aright—at any rate the learned counsel for the plaintiff was very explicit on the point—the suggestion is that the draft now produced was manufactured long after the arbitration proceedings had proved infructuous. But how is this consistent with the passage in the letter noticed immediately above, unless, which we cannot believe, the defendant, having already caused one false draft to be concocted, was at the risk and pains to get a second forged for the purposes of his defence to the present suit. It is not out of place to remark here that the wholesale perjury and forgery of papers with which the Subordinate Judge credits the defendant is somewhat irreconcilable with his description of that gentleman as 'a respectable and extensive land-holder' of the Saháranpur district. We do not concur in the Subordinate Judge's view either that the draft produced is fictitious, or that the statements now made by the defendant about the omissions from the sale-deed, as to the reasons which led him not to conclude the contract, have been concocted since the arbitration was withdrawn. Upon the face of the sale-deed it is to be observed that though the 'area' ('*rakba*'), which would ordinarily be understood to mean area in actual bighas, 'and revenue' are mentioned as 'set forth below,' no detail of the kind is to be found at the foot of the instrument, and no explanation worth a moment's serious attention is offered upon this point by the plaintiff or his witnesses. The notion that because the defendant, having land contiguous to that of the plaintiff, could satisfy himself upon the question of area, there was no particular necessity for his requiring it to be entered in the sale-deed, seems to us an absurd one. For he might have a very good general idea as to the extent of the property and its value, and nevertheless wish for particulars to be specified in black and white, so as to bind his vendor. There is nothing in the conditions set forth in the rough draft which it was unreasonable for the defendant to require before completing

the purchase, or, and this to our minds is very important, that the plaintiff, if he was disposed to deal fairly, could have objected to give. Far from agreeing with the Subordinate Judge that the 3 *purchas* and the rough draft are fictitious and fabricated documents, we, on the contrary, think there is every ground for believing them genuine, while his criticisms on the defendant's letters of the 29th of September and the 15th and 23rd of October strike us as strained and ill-founded. True, these letters are written in view of the possibility of legal proceedings, but they are couched in language which, in our judgment, indicates a genuine desire and readiness on the part of the defendant to bring the matters in difference with the plaintiff to an amicable settlement. Regarding the letter purporting to be signed by the defendant, and dated the 3rd of September, we entertain very serious suspicions. It does not fit in with the other facts in the case, and what makes us most doubtful about it is that not a word of reference is made to its receipt or to the matters with which it is concerned in the plaintiff's letter to the defendant of the 3rd October. There is only one further point upon which we feel called upon to touch, and that is the plaintiff's startling allegation that the defendant, on the morning of the 2nd September, got the signatures of Sant Lal and Kundan Lal affixed to the sale-deed. Why he did so, or what particular virtue was to attach to the addition of these two names, we are not told, nor is his conduct, as described by the plaintiff, explicable on any intelligible grounds. Looking at the evidence as a whole, and giving it our best and most anxious consideration, we have come to the conclusion that the balance of proof is in favour of the defendant, and that the plaintiff has not made out to our satisfaction that the sale-deed ever became a contract binding on the defendant and enforceable against him in law. In this view of the matter the 3rd ground of appeal taken for the defendant succeeds, and it follows as a necessary consequence that the plaintiff's suit must fail. It therefore becomes unnecessary to consider the other questions raised, and it only remains for us to decree the appeal with costs, and to order that the decree of the Subordinate Judge be reversed, and that the plaintiff's suit do stand dismissed with costs in the lower Court."

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On the 18th September, 1884, Baru Mal and Basu Kuar instituted the suit out of which this appeal arose against Dhum Singh. The plaintiffs stated in their plaint as follows:—

"1. That on the 1st September, 1879. Lala Dhum Singh, defendant, executed a sale-deed in respect of his interest in ten villages, Tailipura, &c., in favour of Musammat Basu Kuar, plaintiff No. 1, and wife of Baru Mal, with the permission and under the management of the said Baru Mal, plaintiff No. 2, and out of Rs. 55,000, being the amount of the sale consideration entered in the sale-deed, the defendant gave credit for Rs. 33,359-3-6, being the amount of the debt due by the defendant to Baru Mal, plaintiff, on account-books, and thus settled the account of the debt, and gave credit for it as part of the sale-consideration.

"2 That on the defendant having taken several steps contrary to the engagement in the preparation and execution of the sale-deed, a dispute arose between the plaintiffs and the defendant, whereupon the defendant unjustly brought a claim against the plaintiffs for completion and enforcement of the contract of sale, which (claim) was decreed by the Subordinate Judge of this district on the 24th February, 1881, against these plaintiffs. At last, on an appeal by the plaintiffs, that claim was absolutely dismissed by the High Court, who held the contract to be invalid on the 14th March, 1884.

"3. That notwithstanding the rescission and annulment of the contract of sale, the said defendant objects and refuses to refund the amount of Rs. 33,359 3-6 for which he had given a set-off in the sale consideration, although, seeing that the plaintiffs did not obtain the property sold according to the engagement, and that, in consequence of the defendant's own illegal acts, the contract of sale was declared to be no longer enforceable as mentioned above, the amount for which the defendant had given credit to the plaintiffs on account of the sale-consideration ought to be refunded both in law and justice.

"4. That accordingly the amount in question was repeatedly demanded from the defendant, who at first made excuses from day to day, but ultimately refused to pay it.

"5. That in consequence of this series of illegal acts of the defendant, the plaintiffs suffered a loss to the extent of Rs. 20,015-8-0, which would have been acquired by them by way of usual interest on the sum of Rs. 33,359-3-6.

"6. That the cause of action accrued on the 14th March, 1884, the date on which the contract of sale was declared invalid, and on the 3rd August, 1884, the date of the defendant's refusal.

"The plaintiffs seek the following reliefs:—

"(*a*). That a decree for recovery of Rs. 33,359-3-6, principal amount, and Rs 20,015-8-0, being the amount of damages on account of interest, in all Rs. 53,374-11-6, as well as future interest, may be passed in favour of the plaintiffs against the defendant, by enforcement of the lien which a purchaser legally has on the subject of the sale in the event of annulment of that sale."

Baru Mal having died after the institution of the suit, his sons were made plaintiffs in his stead. The defendant stated in his written statement of defence as follows :—

"1. That in the former suit between the parties to this suit it has been held by the High Court that no contract regarding the sale of the zamindari interest of the defendant in mauzas Tailipura, &c., in favour of the plaintiffs, had been entered into between the defendant and Musammat Basu Kuar or Baru Mal, deceased, father of the other plaintiffs.

"2. That neither Baru Mal, deceased, nor the plaintiffs paid any amount to the defendant, in any way, on account of the consideration of the sale alleged by the plaintiffs respecting the property in question.

"3. That the amount of Rs. 33,359-3-6, alluded to in the 3rd para. of the plaintiff's petition of plaint, was found due from the defendant to Baru Mal, deceased, on account of debt; and in reference to the said amount of debt, Baru Mal, deceased, never did an act which might have the effect of taking away from it the properties of a debt, or in consequence of which the said amount might be deemed to have been paid out of, or credit given for it in favour of the defendant on, the consideration of the sale alleged by the plaintiffs in respect of the above-mentioned property.

"4. That notwithstanding any proceedings that may have been taken regarding the sale of the property, as alleged by the plaintiffs, Baru Mal and others, plaintiffs, continued to deny, from the very beginning, the existence of a contract between the two parties respecting the sale of the property alleged by the plaintiffs, and they all along admitted the aforesaid amount of Rs. 33,359-3-6 as a debt due by the defendant.

"5. That the plaintiffs' claim in respect of the said amount of Rs. 33,359-3-6 is barred by limitation, and that on the dates mentioned in the petition of plaint on which the cause of action is alleged to have accrued, nothing has happened such as might furnish the plaintiffs, or any of them, with a cause of action for recovery of the said amount.

"6. That the rest of the amount claimed by the plaintiffs, or any portion of it, has never been due to the plaintiffs, or any of them, from this defendant; and apart from the fact that the amount in question may be regarded as interest accruing on the aforesaid sum of Rs. 33,359-3-6, or in any other light, that part of the claim is also now barred by limitation, if it be even assumed that the defendant was ever liable to pay that amount, which is moreover unreasonable.

"7. That Baru Mal or the plaintiffs never purchased the property in question as held by the High Court, nor are they entitled to any sort of lien on the property in question, on account of any portion of the amount claimed in this suit."

The Court of first instance (Subordinate Judge of Saháranpur), treating the suit as one for the recovery of a debt of

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Rs. 33,359-3-6, held that the suit was within time. It observed as follows:—

"This is a case in which the two parties rely upon the very statements and evidence referred to in the former suit, contrary to the former contention; that is, the plaintiffs refer the Court to defendant's statements and evidence, and say that he struck off Rs. 33,359-3-6 from the head of balance of debt and admitted the same to be part of the sale-consideration of the immoveable property, and made entries in his account-books accordingly, and that, therefore, it no longer remained a simple debt. The defendant, on the other hand, relies on the fact that the plaintiffs all along contended in the former suit that the sale was not an absolute one, and that the contract of sale was void; that accordingly they hitherto retained the aforesaid item in their account-books as one of debt, and that, therefore, with regard to the expiry of the term of limitation, they cannot now recover the amount in question. I am of opinion that the amount claimed is of the nature of a debt on account books. The sale-deed which was executed was, in consequence of the fact that it was not executed in accordance with the contract admitted by the two parties, declared to be defective, and the plaintiff's right of revoking the contract was admitted by the High Court, and the defendant's claim to have the sale completed and the sale-deed completely executed was dismissed. Hence the disputed amount of debt reverted to its original condition. The plaintiffs are not right in stating that, according to ss. 64 and 65 of the Contract Act, this part of the consideration of the sale-deed was recoverable by the plaintiffs. As to the plea of limitation, it may be observed that it is wrong. The defendant, on the 3rd August, 1880, instituted a suit for having this amount of debt set off against the consideration of the sale-deed: on the 14th March, 1884, that claim was dismissed by the High Court on appeal. The plaintiffs were, under s 12 of the Code of Civil Procedure, not competent to seek determination of this debt by means of a separate suit during the pendency of the above mentioned suit, nor could the Court determine it separately. Therefore, for the period in which the plaintiffs were taking proper steps against the setting off of the amount in question, an allowance should be made to the plaintiffs in computing the term of the suit, and the benefit of exclusion (of time) provided in s. 15, Act XV of 1877, should, by reason of bar under s 12, Civil Procedure Code, be given to the plaintiffs."

As to the lien claimed, the Court held that the amount claimed being of the nature of a debt, the plaintiffs had no lien on the property specified in the sale-deed; and as to interest it held that the plaintiffs should be allowed interest at the rate of 7 annas and 9 pies per cent. per mensem. It accordingly gave the plaintiffs a decree for Rs. 33,359-3 6, with interest at the rate above mentioned, and dismissed the rest of the claim.

The defendant appealed to the High Court.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan*, Mr. *G. T. Spankie*, and Pandit *Bishambar Nath*, for the respondents.

Mr. *Hill* contended that the lower Court had erroneously applied the provisions of s. 15 of the Limitation Act, and the suit, being one for a debt, was barred by limitation.

Mr. *Conlan*.—The suit is not one to recover a debt, but one for money had and received by the defendant for the plaintiff's use, and is governed by art. 62 of the Limitation Act. The money was received by the defendant when he treated it as received by him, by crediting it in his books, and it must be taken to have been received for the plaintiff's use when the High Court dismissed the former suit. When that happened, there was a total failure of consideration, because the defendant had already repudiated the contract which the plaintiff set up.

Mr. *Hill* was not called on to reply.

PETHERAM, C.J.—This was an action to recover a sum of Rs. 33,359-3-6, which was admittedly due by the defendant to the plaintiff, and if the defendant were an honest man he would pay the debt. He has, however, set up the plea of limitation, and the law says that he may set up that plea, and that, even if he does not, the Court is bound to give effect to it. The Judge before whom the case was tried gave judgment for the plaintiff upon grounds which it is not necessary to notice, because they have not been insisted on before us by the plaintiff's counsel, who has urged other reasons for the contention that the Limitation Act is not applicable. It is contended by him that the debt had become due by the defendant to the plaintiff within the prescribed period of limitation, and the only question therefore which we have to determine is, at what time did the debt become due.

Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the plaintiff of Rs. 33,359-3 6, that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property, and negotiations took place for

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the sale of this property to the plaintiff, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dispute arose as to what had been settled as to the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal, the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is, that the contract set up in that suit was not proved, because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in no agreement; and the original debt due by the present defendant to the present plaintiff always remained due and is so still.

It is alleged that the contract was completed on the 1st September, 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date, by reason of prior transactions; but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th September, 1884, that is to say, much

more than three years from the latest possible date upon which the debt can be said to have become due. Under these circumstances, the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed; and under its terms this money, having been credited in the present defendant's books, was to be treated as a payment by the present plaintiff as a deposit on account of the sale; and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court decided that the contract set up by the present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself which is now set up by the plaintiff, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September, 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to say that the money was anything but the old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs.

STRAIGHT, J., concurred.

Before Sir Comer Petheram, Kt, Chief Justice, and Mr. Justice Tyrrell.

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SITA RAM (PLAINTIFF) *v.* ZALIM SINGH AND ANOTHER (DEFENDANTS.) *

Hindu Law—Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt, when not incurred for immoral purposes.

A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit *G* died, and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas, and not merely against the share therein which *G* during his lifetime might have got separated,

* First Appeal No. 118 of 1884, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 19th April, 1884.

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plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G's* personal expenses.

Held that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomi Babuasin* v. *Modan Mohun* (1) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Ajudhia Nath* and Babu *Dwarka Nath Banarji*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the respondents.

PETHERAM, C. J., and TYRRELL, J. – Sita Ram, a money-lender, brought this suit on a mortgage-bond dated the 9th June, 1880, and two revenue receipts with a promissory note, against his debtor, Thakur Gotam Singh, the head of a joint undivided Hindu family. He claimed his money with interest by enforcement of his mortgage on ten biswas of ancestral estate in Kunwara, pledged to him as security by Gotam Singh. While the suit was in progress Gotam Singh died, and the right to sue being deemed to survive, the defendant's son, Zalim Singh, and his widow, Bhawani Kuar, were brought on the record, as his legal representatives, in his place, under the provisions of s. 368 of the Civil Procedure Code. As the suit was first brought in the lifetime of Gotam Singh, the sole question was whether the debt was due and the hypothecation valid. But his death changed the aspect of the case, and new issues arose for decision. It is an unquestioned fact that the property hypothecated is part of a joint undivided ancestral estate, and it is no less certain that, on the death of Gotam Singh, the entire estate passed to his son, Zalim Singh, by survivorship. The plaintiff's right therefore to maintain his suit against Gotam Singh's heirs and his estate in their

(1) Decided by the Privy Council on the 18th December, 1885

hands after Gotam Singh's death, did not survive on the same ground or in the same way as it would in the similar suit brought against heirs and estates *not* governed by the Hindu law, and subject to devolution by survivorship as distinguished from inheritance ;' in other words, the son of Gotam Singh, who, immediately on his death, took, and now represents, the whole ancestral estate, is not a person holding any property of Gotam Singh, which the latter's creditors can follow as assets of the paternal estate into the hands of the son as heir. But under the law affecting Hindu joint ancestral estate, every member of the family is a potential owner of a separable portion of his share of the estate ; and as such he is competent to charge his debts on the undivided estate to the extent of his own partible, though unseparated, share. It is this right to sue which has survived to the plaintiff after the death of Gotam Singh—the right to seek for a decision that, his debt being proved, the share in the estate which Gotam Singh might have got separated as his own in his lifetime stands charged with this debt under the mortgage-deed on which the claim is based, and, being made the subject of partition, may now be sold or otherwise dealt with in satisfaction of the debt. But the plaintiff wants something more. It is conceivable, and perhaps probable, that Gotam Singh's share in the family ten biswas of Kunwara may not suffice to pay the debt, and the plaintiff consequently asks for a decree against the whole ten biswas now in Zalim Singh's possession which Gotam Singh affected to deal with in his bond of June, 1880.

There are two ways in which a Hindu son might be saddled with the responsibility of a paternal debt in connection with property like this ten biswas of Kunwara. The father, as head of the family and manager of its estate, might have raised the loan in this express capacity for family purposes, the money borrowed being thus applied, so as to make the son a party to the contract by procuration of his father, and by participation on his own part in the benefit of the loan. Or the plaintiff might have pleaded that the debt incurred was of such a character that the Hindu law imposed upon a pious son the duty of discharging it from his own estate. In the present case, the latter line was adopted by the creditor ; and accordingly we find that the main issue propounded by the Court below was,—" What was the necessity under

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which the money was borrowed by Gotam Singh? and was it such that the ancestral estate should be held liable for the debt?"

The Court found on the evidence, which is practically uncontradicted, in this respect, that while the father was grossly extravagant and selfish in his expenditure, still there is no evidence that the proceeds of this particular loan were applied to any special "licentious acts;" but finding that "the money in question was neither borrowed to meet any family necessity, nor laid out in necessary expenses, but was used in the personal expenses of Gotam Singh," the Court below decreed that the debt should be charged on the share of Gotam Singh alone. This decree is challenged here on the ground that the evidence does not warrant this finding of fact, as it does not establish that Gotam Singh "wasted the money on immoral purposes," or that the debt is such that a pious son is free to repudiate it.

It is now settled law that "sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of joint estate there is now, as their Lordships think, no conflict of authority."——*Nanomi Babuasin* v. *Modun Mohun*, decided on the 18th December, 1885.

The Court below was therefore wrong in exempting half of the whole property mortgaged for his debt by the father Gotam Singh; and, allowing the pleas of the appellant in this respect, we must modify the decree so as to make it a decree enforceable against the entire joint ten biswas share in Kunwara, with costs. The plea in respect of the disallowed claim for Rs 299-0-3 is without force, and is disallowed with proportionate costs.

Appeal allowed.

Before Sir Comer Petheram, Kt., Chief Justice, and Mr Justice Brodhurst.

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MUHAMMAD ALLAHDAD KHAN AND ANOTHER (PLAINTIFFS) v. MUHAMMAD ISMAIL KHAN AND OTHERS (DEFENDANTS)*.

Muhammadan law—Legitimacy—Effect of acknowledgment of sonship

Held by PETHERAM, C.J., that, according to the Muhammadan law, the effect of an acknowledgment by a Muhammadan that a particular person, born of

*First Appeal No 83 of 1885, from a decree of Babu Mirtonjoy Mukerji, Subordinate Judge of Meerut, dated the 3rd March, 1885.

the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashruf-ood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (1), *Muhammad Azmat Ali Khan* v. *Lalli Begum* (2), and *Sadakat Hossein* v. *Mahomed Yusuf* (3), referred to.

In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son.

Held by PETHERAM, C. J., (BRODHURST, J., dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the *status* of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the *status* of legitimacy.

Held by BRODHURST, J., *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff, and give him the *status* of a son capable of inheriting *Sadakat Hossein* v. *Mahomed Yusuf* (3) referred to.

THE plaint in this case stated that one Ghulam Ghaus Khan died on the 6th November, 1879, leaving by his lawful wife, Moti Begam, two sons, the plaintiff Muhammad Allahdad Khan and Ismail Khan, defendant, and three daughters, Fidayat-un nissa, Karamat-un-nissa, and Barkat-un-nissa, defendants; that the property left by Ghulam Ghaus Khan was divisible, under Muhammadan law, into 7 sihams or shares, of which 2 shares devolved upon each of the sons and 1 share upon each of the daughters; and that in order to raise money for the purposes of this suit the plaintiff Allahdad Khan had sold one of his shares to the other plaintiff; and the plaintiffs claimed possession of 2 shares out of 7 shares in certain villages left by Ghulam Ghaus Khan; a

(1) 11 Moo. I. A. 94.
(2) I. L. R., 8 Calc. 422; L. R., 9 Ind. Ap. 8.
(3) I. L. R., 10 Calc. 663; L. R., 11 Ind. Ap. 31.

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declaration of their right to redeem 2 shares out of 7 shares in certain other villages left by him, the setting aside of certain alienations made by the daughters; and mesne profits.

The defendants, Ismail Khan and the three daughters, set up as a defence to the suit, that the plaintiff Allahdad Khan was not the son of Ghulam Ghaus Khan, but his step-son, having been born of Moti Begam before she married Ghulam Ghaus Khan.

The case of the plaintiffs was that Allahdad Khan was the eldest son of Ghulam Ghaus Khan by Moti Begam, and that even if they failed to prove that Allahdad Khan were the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had acknowledged him to be his son, and therefore, under Muhammadan law, Allahdad Khan was entitled to inherit as the son of Ghulam Ghaus Khan.

The question which the lower Court considered was, "Did Ghulam Ghaus Khan acknowledge Allahdad Khan as a son of his body, or is he really a son of his loins?"

The lower Court held that the plaintiffs had failed to prove that Ghulam Ghaus Khan had acknowledged Allahdad Khan to be the son of his body, or that Allahdad Khan was the son of his body, and dismissed the suit.

The plaintiffs appealed to the High Court.

In support of their case the plaintiffs relied on, amongst other evidence, the following documentary evidence:—

(a) A letter dated the 15th April, 1861, from Ghulam Ghaus Khan to Allahdad Khan. This letter was addressed as follows:—"*Barkhurdar* Mian Allahdad Khan, the solace of my life,"—"*barkhurdar*" being a form of address to a son. In this letter Ghulam Ghaus Khan asked Allahdad Khan to send him a power of attorney authorizing him to sue on certain bonds of which Allahdad Khan was the obligee. On the back of the letter he wrote a draft of the power. The material portion of the draft was as follows:—"I, Allahdad Khan, do declare that I hold certain bonds, but in consequence of my being in service I am unable to go to Bulandshahr and file suits thereon. I have therefore

appointed *my father*, Muhammad Ghulam Ghaus, my general attorney for suing on those bonds, *etc.*"

(*b*) A plaint in a suit instituted by Ghulam Ghaus Khan on one of the bonds mentioned above as attorney of Allahdad Khan. This plaint was entitled :—"Ghulam Ghaus Khan, Mukhtar (Attorney) of Muhammad Allahdad Khan, his son, *etc.*," and was signed by Ghulam Ghaus Khan.

(*c*) A deposition of Ghulam Ghaus Khan, taken in the suit above mentioned and signed by him, dated in June, 1862, in which he spoke of Allahdad Khan as "his son."

(*d*) A general power-of-attorney, dated in October, 1877, executed by Fidayat-un-nissa, defendant, daughter of Ghulam Ghaus Khan, appointing "*her own brother*," Allahdad Khan, her general attorney.

(*e*) A letter from Ghulam Ghaus Khan to Allahdad Khan, dated in 1861, addressed as follows:—"To my *Barkhurdar*, light of my eyes and comfort of my soul, Muhammad Allahdad Khan. May he live in peace."

(*f*) Certain other letters from Ismail Khan, defendant, to Allahdad Khan, which, it was contended, showed that the writer treated Allahdad Khan as his elder brother.

The defendants relied on a copy of paragraph 5 of the *wajib-ul-arz*, dated the 17th December, 1870, of one of the villages in suit. This, it was alleged, was a declaration by Ghulam Ghaus Khan. It was signed by the Deputy Collector and by "Fazal Husain, mukhtar of the zemindar." The paragraph was in these terms:—

"No property is transferred by mortgage, but in future I have every power to transfer it to any person I like: my eldest son, Muhammad Ismail Khan, is major, and intelligent and clever; and the two other sons are minors: after me my eldest son Muhammad Ismail Khan shall be the owner and manager of the whole estate, and both his younger brothers shall, during their minority and after attaining majority, remain under his control and live joint with him; their elder brother shall attend

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to their necessary expenses and render every kind of assistance on the occasion of their marriages, &c."

Mr. *W. M. Colvin*, Mr. *Abdul Majid*, Lala *Lalta Prasad*, and Shah *Asad Ali*, for the appellants.

Mr. *T. Conlan*, Lala *Juala Prasad*, and Babu *Jogindro Nath Chaudhri*, for the respondents.

BRODHURST, J.—One Ghulam Ghaus Khan resided at Jhajhar, zila Bulandshahr, and owned zemindari and other property in that district. According to evidence on the record, he was twice married, and he also had a concubine. The latter survived him, whilst both of his wives pre-deceased him. He died on the 6th November, 1879, and left several legitimate and illegitimate children, the former being by his second wife, Moti Begam, and the latter by the concubine Musammat Nanhi.

Almost immediately after the death of Ghulam Ghaus, proceedings for mutation of names were taken in the Revenue Court. All the persons then claiming to be the heirs of Ghulam Ghaus took part in those proceedings, and on the 15th March, 1880, the Deputy Collector, Lachman Singh, decided the case in favour of Ismail Khan, son of Ghulam Ghaus Khan, and directed that his name should be substituted for that of his father in the register of mutations. In consequence of this order a suit was, on the 4th May, 1880, brought in the Court of the Judge of Meerut against Ismail Khan, who alleged that he was, and was admitted to be, the legitimate and eldest son of Ghulam Ghaus and Moti Begam.

The plaintiffs were eight persons—namely, the three full sisters of Ismail Khan, Nanhi, styling herself Nanhi Begam, widow of Ghulam Ghaus, and her three sons and one daughter, calling themselves the lawful issue of Ghulam Ghaus Khan. These plaintiffs claimed their respective shares in the property of Ghulam Ghaus, deceased. The case was tried by the Subordinate Judge of Meerut. The defendant, as is reported on page 724, I. L. R., 3 All., "set up as a defence to this suit that Nanhi Begam was not the lawful wife of Ghulam Ghaus Khan, and her children by him were illegitimate, and therefore her claim and that of such children to inherit Ghulam Ghaus Khan's estate was not maintainable; and that by the custom of the family, which the will of Ghulam Ghaus

Khan recognised and affirmed, the eldest son succeeded, and females were excluded from succession, and therefore the claim of the other plaintiffs, the daughters of Ghulam Ghaus Khan, was not maintainable. The Court of first instance fixed the following issues, amongst others, for trial :—" Is Nanhi Begam the married wife of Ghulam Ghaus Khan or his mistress ? Is she, and are her children, entitled to inherit ? Are the daughters of Ghulam Ghaus Khan entitled to inherit, or are females in the family of Ghulam Ghaus Khan not entitled to inherit, and the eldest son alone succeeds, and other members of the family are excluded from inheritance ? How far can the will be acted on ? The Court found on the evidence in the case that the children of Nanhi Begam by Ghulam Ghaus Khan had been uniformly treated by their father and his lawful daughters and son as legitimate, and held, relying on *Khajooroonissa* v. *Rowshan Jehan* (1), and the Privy Council decision therein cited ; that it must be presumed that Nanhi Begam was the lawful wife of Ghulam Ghaus Khan, and her children by him legitimate. It also found that there was no such custom of succession in the family of Ghulam Ghaus Khan as was set up by the defendant ; and it held, relying on *Khajooroonissa* v. *Rowshan Jehan*, that, according to Muhammadan law, a devise of property could not be made to one heir to the exclusion of the other heirs without their consent ; and that therefore the plaintiffs could not be excluded from inheriting by the will of Ghulam Ghaus Khan in the defendant's favour. It accordingly gave the plaintiffs a decree for their legal shares of the estate of Ghulam Ghaus Khan. The defendant appealed to the High Court. On his behalf it was contended on the evidence that Nanhi Begam had not been treated by Ghulam Ghaus Khan and the members of the family as his wife, or her children by him as legitimate, and that the custom of succession in the family set up by him was proved."

A Bench of this Court (Spankie and Straight, JJ.), after referring to the evidence on the record and certain rulings of the Privy Council, observed :—" We therefore cannot but conclude that Nanhi was not the wife of Ghulam Ghaus Khan, and that the children were born illegitimate, and have never been legitimated by treatment in the house of their father as legitimate,

(1) I. L. R., 2 Calc. 184 ; L. R., 3 Ind. Ap 291.

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and on this ground the suit of Nanhi and her children must fail." The learned Judges also held that the custom alleged by the defendant-appellant of primogeniture, and the exclusion of the females and other heirs from inheritance, was established against the defendant; that this plea failing, "the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed;" and the learned Judges consequently modified the decree of the first Court, dismissing the claim of Nanhi Begam and her children, and giving the remaining three plaintiffs, the full sisters of the defendant, a decree for the shares to which they were entitled under the Muhammadan law.

The original suit was instituted on the 4th May, 1880, and was decided on the 14th July, 1880. The appeal was filed on the 13th August, 1880, and was disposed of on the 21st April, 1881. During the whole time that the above mentioned proceedings lasted, Allahdad Khan never applied to be made a party, and he did not bring his present suit until the 13th May, 1884, *i.e.*, not until after the expiration of three years from the disposal of the above-mentioned appeal, and of four and a half years from the date of the death of Ghulam Ghaus Khan.

He now alleges that he and the defendants Ismail, Musammats Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, "are the children of Ghulam Ghaus Khan by Musammat Moti Begam, his lawful wife;" that cases and proceedings which he alludes to have taken place in his absence and without his knowledge, and therefore he and the other plaintiff also, as explained in para. 7 of the plaint, sue for his share of the property left by Ghulam Ghaus Khan. The defendants replied that the plaintiff was not the son of Ghulam Ghaus Khan; that he was not born in wedlock; that he came with Moti Begam to Ghulam Ghaus Khan's house; that under the Muhammadan law he did not possess any right in the estate left by Ghulam Ghaus Khan; that his allegations were entirely false; that "all the proceedings taken in the revenue, the criminal, and the civil cases by the defendants Nos. 2, 3, and 4 against defendant No. 1, were taken with the knowledge and information of the plaintiff and in his presence, and he conducted the proceedings in the said cases as a karinda (agent) of defendant No. 1, against defendants Nos. 2, 3, and 4, without

advancing his own right against the defendants in any Court; that had plaintiff been the eldest son of Ghulam Ghaus Khan, his name would surely have been recorded in the village administration paper, verified by Ghulam Ghaus Khan; that, as a general rule, any son or daughter brought by a wife with her to the house of her second husband is called by the latter his son or daughter: therefore if Ghulam Ghaus Khan has on some occasion called plaintiff No. 1 his son, it shall not make the said plaintiff actually his son." The Subordinate Judge appears to have fully considered the evidence that has been adduced on either side, as also the law and the rulings referred to, and he has found that Allahdad Khan is not a son of Ghulam Ghaus Khan; that Ghulam Ghaus never really acknowledged him to be his son; that Allahdad consequently has no right to inherit any portion of the estate of Ghulam Ghaus; and the Subordinate Judge has dismissed the suit with costs.

The plaintiffs have taken numerous grounds of appeal against this decision. They still contend that Allahdad is the eldest and legitimate son of Ghulam Ghaus and Moti Begam, having been born in wedlock, and that even if he was not born in wedlock, he has been legitimated by Ghulam Ghaus Khan's admission and treatment of him, and that the judgment of the lower Court is opposed to the evidence, the law, and the rulings of the Privy Council and of every High Court. I concur generally in the opinion that the Subordinate Judge has expressed with regard to the evidence for the plaintiffs.

I agree with him in thinking that Mr. Young, who was examined by commission, has, to the best of his belief, deposed with entire truthfulness, but nevertheless I consider that Mr. Young's evidence is of very little, if any, value. Mr. Young's evidence relates to matters that occurred about 24 years previously, and amounts to this,—that when he was at Bulandshahr in 1860, Ghulam Ghaus Khan brought Allahdad Khan, who was then a young man of 20 years of age, to see him, and brought him, so far as Mr. Young remembers, "as his son," and afterwards, in 1861 or 1862, sent him to Bánda, where Mr. Young was Superintendent of Police, and Mr. Young deposes:—"I gave him

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the appointment of head constable of police on the strength of his being the son of the above (Ghulam Ghaus Khan). I have always considered Allahdad Khan to be his son, being sent to me as such, as far as I can remember." Mr. Young is apparently by far the most credible of the plaintiff's witnesses, and great stress has been laid upon what he has stated; but from his evidence it is not clear that Ghulam Ghaus Khan informed Mr. Young that Allahdad Khan was his own son; and that Mr. Young's knowledge with respect to Ghulam Ghaus Khan's family was extremely limited is apparent from his evidence in cross-examination. Moreover, as Ghulam Ghaus Khan had in 1857 saved the life of Mr. Young, it is natural to suppose that on his application, Mr. Young would gladly have conferred the appointment of head constable upon Allahdad Khan, provided that the young man was qualified for the post, and it is not probable that Mr. Young would, under such circumstances, have hesitated to comply with Ghulam Ghaus Khan's request, even if he was then aware that Allahdad was not Ghulam Ghaus Khan's own son, but his step-son. From the evidence on the record, I am satisfied that Allahdad Khan was the son of Moti Begam, and that he was born a year or two before Moti Begam was married to Ghulam Ghaus Khan. Prior to that marriage Moti was a prostitute, and there is no proof who was the father of Allahdad. There is no evidence that Moti cohabited with Ghulam Ghaus Khan before their marriage. Had she done so and borne a child to him, it is improbable that the marriage would have been so long delayed, and if Ghulam Ghaus believed Allahdad to be his son, he surely, after he had married that son's mother, would have taken effective steps to legitimate his son, and to make it widely known that Allahdad was his eldest son and an heir to his property. He did not do so. Allahdad was from about his second year at Jhajhar, and he apparently lived sometimes with his maternal grandmother and uncle, but more frequently at the house of his mother and her husband. He was thus brought up with his half-brothers and sisters, the legitimate children of Ghulam Ghaus Khan and Moti Begam; and as his own father's name was unknown, as he came to Ghulam Ghaus Khan's house in his infancy, was the son of Ghulam Ghaus Khan's wife, and the brother of Ghulam Ghaus

Khan's children, he doubtless came to be regarded by Ghulam Ghaus as a step-son, and to be called his son, much in the same way as a European, who marries a widow with young children, will ordinarily call those children his children, and be termed by them their father. If Ghulam Ghaus did, under the circumstances above mentioned, speak of Allahdad as his son, he apparently did not thereby act contrary to the custom prevailing amongst Muhammadans.

The few letters and other documents that have been filed by the plaintiffs, and are specially relied upon by them, bear dates corresponding with the years 1861 and 1862. In none of them is Allahdad called the eldest son of Ghulam Ghaus or his own son and heir. They were written at a time when Allahdad Khan was employed as a head constable in the district of Bánda, and the power-of-attorney was executed with the special object of enabling Ghulam Ghaus to sue for money due to Allahdad, and which the latter, owing to his being in Government service in a distant district, would not otherwise have been able to realize.

In accordance with the practice, a man in executing documents or making his deposition states the name of his father. Had Allahdad, in the general power-of-attorney executed by him in favour of Ghulam Ghaus Khan, or in the evidence of the latter person, been described as the son of an unknown father, it would have reflected upon Moti Begam, the lately-deceased mother of Allahdad and wife of Ghulam Ghaus Khan; it would have revived a scandal that had perhaps been forgotten after many years of married life, and would have been highly unpleasant to both men, and for these reasons Ghulam Ghaus Khan was probably in the document, as in ordinary conversation, styled the father of Allahdad Khan. Allahdad was apparently 30 years of age when Ghulam Ghaus Khan died; but with the exception of the few papers written 17 or 18 years before his death, and under the special circumstances mentioned above, there is no documentary evidence to support the plaintiff's allegations. On the other hand, if the *wajib-ul-arz*, dated the 17th December, 1870, is, as I think, admissible in evidence, it furnishes the strongest proof against Allahdad's pretensions. The extract from the *wajib-ul-arz*, which has been admitted

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by the lower Court, was admitted in evidence by another Subordinate Judge in the suit of 1880, and was considered by a Bench of this Court in the first appeal above referred to as having been disposed of on the 21st April, 1881. The *wajib-ul-arz* appears to have been duly attested and signed by Raja Lachman Singh, a Deputy Collector in charge of the settlement office at Bulandshahr, under Rule 49 of rules issued with the sanction of the Governor-General in Council under s. 257 of Act XIX of 1873. The *wajib-ul-arz* was produced before Raja Lachman Singh, in the presence of the mukhtar of Ghulam Ghaus Khan, of the patwári of his village, and of the kanúngo, and I see no reason whatever to doubt that its contents were in accordance with the wishes and instructions of Ghulam Ghaus Khan; and this being the case, it is obvious that in September, 1870, that is at a time when there was not alleged to have been any difference between Ghulam Ghaus and Allahdad, Ghulam Ghaus Khan caused an entry to be made in the settlement record that Muhammad Ismail Khan was his eldest son; that he would be the owner and manager of the whole estate; that the two other sons of Ghulam Ghaus were minors; and that they both would, during their minority and after attaining majority, live jointly with Ismail Khan and under his control.

Allahdad was at that time 30 years of age, but he is neither mentioned as a son nor referred to in any way whatever. This *wajib-ul-arz* was prepared, attested, and signed nine years before Ghulam Ghaus died; its contents, if Allahdad was the eldest son, were very startling, untrue, and unjust. They must have been well known to many persons, and could not well be concealed from the eldest son, who had been disinherited and ignored without any apparent reason. But this document was never disputed during the nine years that Ghulam Ghaus lived after its execution.

There has been no consecutive course of treatment of Allahdad by Ghulam Ghaus during a number of years, tending to show that Ghulam Ghaus considered him the son of his loins and an heir of his estate; on the contrary, the acts of Ghulam Ghaus, from the time of his marriage with Moti Begam up to the date of his death, seem to me to prove that Ghulam Ghaus did not regard Allahdad as a son who was eventually to succeed to a

share of the ancestral estate. Allahdad, if the son of Ghulam Ghaus Khan, was his eldest son. The *Rais* of Jhajhar, with a property valued at two lakhs of rupees, would not be likely to allow his own eldest son and heir to take the post of head constable of police and go away to a distant district; but it is intelligible that he would be glad to obtain an appointment of that kind for his wife's illegitimate son, and consider it a suitable provision for the young man. The following appears to be established facts :—that Allahdad was not born in wedlock; that he was the son of Moti by an unknown father; that his mother was at the time of his birth, and up to the time that she married Ghulam Ghaus, a prostitute; that Allahdad did not go to Ghulam Ghaus Khan's village to reside there until he was one or two years of age or more; and that when there he lived sometimes with his maternal grandmother and uncle, who apparently were persons of low position, and sometimes with his mother and her husband; that in 1861, when he was about 21 years of age, Ghulam Ghaus Khan obtained for him the post of head constable of police in the district of Bánda, and he was thus sent to a considerable distance from the town of Jhajhar; that in the course of about eighteen months he was dismissed from his appointment; that he subsequently for several years tried to obtain his reinstatement, but without success; that he returned to Jhajhar and constantly resided there with his wife and family; that he admittedly was there in October, 1879, that is, only a few days before Ghulam Ghaus Khan died; and that he and his wife did not finally leave that town until towards the end of 1883; that Ghulam Ghaus Khan made no allusion to him in the *wajib-ul-arz* of 1870, and styled Ismail Khan his eldest son; and although there was no variance between Ghulam Ghaus and Allahdad prior to 1879, Ghulam Ghaus had, for at least two years previous to 1879, made over the management of his estate to Ismail Khan, who admittedly was his legitimate son, had never taken service, and always remained at home.

It is conceded that there was not any ill-feeling between Allahdad and Ghulam Ghaus prior to 1879. The former deposed :—"At the beginning of 1879 there was some variance between myself and Ghulam Ghaus Khan. He died on the 6th November,

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1879. The matter of difference was, that my sister Fidayat-un-nissa, who was a widow, was about marrying a second time, to which Ghulam Ghaus and Ismail Khan had consented, but I had not been consulted. There was no difference before then." There is no reliable evidence that there was, even in 1879, any difference between Ghulam Ghaus and Allahdad, and if the latter was the eldest son and was on good terms with his father, there is no apparent reason why his consent to his sister's re-marriage should not have been asked for equally with that of Ismail, his younger brother. His admission that he was not consulted tells against the position he sets up for himself.

Were Allahdad either the legitimate or legitimated son of Ghulam Ghaus Khan, it is most highly improbable that Ghulam Ghaus Khan and his other sons and daughters, legitimate and illegitimate, should all, without any sufficient reason, have acted towards him in the way they are shown to have done. It is proved that Allahdad not only knew about the mutation proceedings in the Revenue Court and the suit of 1880 in the Civil Court, but that he also used to attend upon Ismail Khan's pleader on behalf of Ismail Khan during the pendency of those cases, and his acts and omissions for many years past tend to support the allegations of the defendants-respondents and to prove the falseness of his claim. From the evidence and the whole circumstances of the case it is, I think, palpable that Allahdad was not the son of Ghulam Ghaus Khan; that he was not legitimated by Ghulam Ghaus, and that he well knew that he was, at the highest, nothing more than Ghulam Ghaus Khan's step-son, had never been called his son except by courtesy, and had no right to any share in his (Ghulam Ghaus Khan's) property. This case is, in my opinion, very different to the cases referred to by the learned counsel for the appellants, and is not governed by any of the Privy Council rulings. The most recent judgment of their Lordships of the Privy Council on this branch of the Muhammadan law that has come to my notice was delivered in December, 1883, in the case of *Sadukat Hossein* v. *Mahomed Yusuf* (1). In that judgment, on page 36, the following passage occurs:—"The Judge of the primary Court, who saw and who heard the witnesses, and the Judges of the Supreme

(1) I. L. R., 10 Calc. 663; L. R., 11 Ind. Ap. 31.

Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir."

I see nothing to lead me to believe that Ghulam Ghaus Khan ever regarded Allahdad in any other light than that of a step-son; and applying the principle contained in the above remarks of their Lordships of the Privy Council to the present case, I find that there is no sufficient evidence of the acknowledgment by Ghulam Ghaus Khan of Allahdad Khan as his son, from which an inference is fairly to be deduced that Ghulam Ghaus Khan ever intended to recognise him and give him the *status* of a son capable of inheriting, and I would therefore dismiss the appeal with costs.

PETHERAM, C J.—The evidence in this case proves, in my opinion, that the plaintiff-appellant, Allahdad Khan, was the illegitimate son of Ghulam Ghaus Khan. I also think, upon the evidence, that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was in the inception, at all events, an illegitimate son of his father. Then there is the material circumstance that it is proved by evidence, the truth of which is beyond doubt, that upon several occasions, in 1862, Ghulam Ghaus Khan did at that time acknowledge the plaintiff Allahdad Khan to be his son in fact. I refer in particular to the letter from Ghulam Ghaus Khan to Allahdad Khan, dated the 15th April, 1861, in which the latter is directed to prepare a general power-of-attorney, describing the former as his father. I take it as proved, therefore, first, that Allahdad Khan was, in fact, Ghulam Ghaus Khan's illegitimate son, and secondly, Ghulam Ghaus Khan acknowledged him as such on many occasions after his marriage with Moti Begam. The case thus resolves itself into a pure question of law, namely :—What,

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according to the Muhammadan law, is the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledger's wife before marriage, is his son? How does such an acknowledgment affect the *status* of the person in reference to whom it is made? The answer to this question appears to me to depend upon the effect of several decisions of the Privy Council, and if the decisions were precisely in unison, there would be no difficulty in the matter. At first sight, however, they appear to be contradictory, and I have found it far from easy to arrive at a definite conclusion as to the rule of law which they were intended to express. The first of the rulings I refer to is in the case of *Ashrufood Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan* (1). The parties in that case belonged to the *Shia* sect of Muhammadans. The respondent claimed to be the son of Nawab Ameenood Dowlah, but the appellants alleged that he was illegitimate. "He, however, relied on a *moottah* (or irregular) marriage with his mother with the Nawab, and his consequent birth in wedlock, and insisted that the Nawab had in his lifetime acknowledged him as his son; and he further relied on a decision of the Civil Judge at Lucknow in a summary suit for the administration of goods of the Nawab, under the Acts Nos. XIX and XX of 1841 and X of 1851, by which he had obtained a certificate of joint administration and title with the appellants, subject to their right to bring a suit to prove his illegitimacy. The appellants denied the *moottah* marriage and the declaration and acknowledgment by the Nawab of the respondent as his son, and set up and relied on a deed of disclaimer and repudiation of the respondent, executed by the Nawab in his lifetime, denying that the respondent was his son, which deed was proved in the suit." In that case, therefore, the respondent was the Nawab's son, and a question arose as to his legitimacy, and whether, supposing him to be illegitimate, he had been acknowledged by his father, and the *status* of a legitimate son was conferred on him. The judgment of the Privy Council was delivered by Sir James Colvile. He said :—"The appellants brought their suit in the Civil Court at Lucknow on the 6th June, 1861. The object of the suit, as it appears from the plaint, was to be relieved

(1) 11 Moo. I A. 94

from the effects of the summary decree and to establish the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment. The issues, as also the finding, are carefully framed and evidence an accurate knowledge of the Muhammadan law as to legitimacy. The first, second, and third issues, are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows :—First, did Nawab Ameenood Dowlah (deceased) contract *moottah* with defendant's mother before or after his birth? Second, has the deed of repudiation (dated 23rd *Suffar* 1272 *Hijri*) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made? Third, if defendant be not a legitimate son, is he an illegitimate son of deceased? It was admitted on the pleadings that a *moottah* marriage at some time had been contracted between the late Vizier and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of *moottah* marriage therefore, at some time, was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word 'sonship,' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Muhammadan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son."

From this it is obvious that in 1866, when the judgment of the Privy Council in that case was delivered, their Lordships were of opinion that an acknowledgment of mere sonship was not sufficient; that the question was not whether the person concerned was acknowledged to be the son of the acknowledger, but whether the

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father, by acknowledgment, had given him the *status* of a legitimate son. This is different from the question whether the father had acknowledged that the person was in fact his son, that being a preliminary matter. I gather, especially from the third issue mentioned, that the Privy Council were at that time of opinion that a Muhammadan could not make another person's son his own, but that all he could do was to give his illegitimate son the *status* of legitimacy, if he desired to do so.

Now, in the present case, it is clear from the facts proved that Ghulam Ghaus Khan, though he intended to acknowledge Allahdad Khan, *as his son in fact*, never intended to give him the *status* of a legitimate son, because he did not treat him as his legitimate son, and the young man's conduct, after his father's death, shows that he never understood his father to have meant to give him the *status* of a legitimate son, or to have done more than acknowledge the fact of his sonship.

The next decision of the Privy Council on this subject was in the case of *Muhammad Azmat Ali Khan* v. *Lalli Begum* (1) decided in 1881, and it appears to me that the sole question on the determination of which the present case depends, is whether this second judgment of the Privy Council has altered the law laid down in the first, so as to establish the proposition that a mere acknowledgment of the fact of sonship confers the *status* of legitimacy. In delivering their Lordships' judgment Sir Montague Smith said:—"The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Muhammadan law has not been disputed at the Bar, namely, that the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case."

Now the conditions here referred to were not such as exist in the case before us. They were conditions showing that it was

(1) I. L. R., 8 Calc. 422; L. R., 9 Ind. Ap. 8.

impossible that the person claiming the rights of a son should be, in fact, the son of the person whom he alleged to be his father. What was held was that an acknowledgment of children by a Muhammadan *as his sons* gave them the *status* of legitimacy. I am unable to avoid the conclusion that this is what was held by the Privy Council in that case.

Now this decision is binding on us, unless it has been overruled by the Privy Council itself. The only other ruling of their Lordships on the subject is in *Sadakat Hossein* v. *Mahomed Yusuf* (1). In delivering judgment, Lord Fitzgerald quoted the observations of Sir Montague Smith upon which I have commented to the effect that "the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons," and said:—"Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it." So that the proposition laid down by Sir Montague Smith is distinctly re-affirmed. Lord Fitzgerald then continues:—"The Judge of the primary Court, who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been especially established by recognition so as to enable him to claim as heir."

This latter passage does to some extent appear to dilute the proposition stated by Sir Montague Smith, but as the first passage distinctly and in terms affirms that proposition, I am of opinion that it carries the plaintiff before us the whole way that is necessary for the establishment of his case. Under these circumstances I am of opinion that the judgment of the first Court should be reversed and the plaintiff's claim allowed, but as there is a difference of opinion in this Court, our decree must be in accordance

(1) I. L. R, 10 Calc. 663, L. R., 11 Ind. Ap 31.

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with that of the Court below. I must add, in reference to the question of law which I have discussed, that I have given expression to what appears to me to be the law as laid down in the books, but that the law so laid down is not, in my opinion, in accordance with the custom of the people of this country.

Appeal dismissed.

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April 5.

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* DUNGAR AND ANOTHER.

Act XLV of 1860 (*Penal Code*), *s.* 201.

S. 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the case of a person who screens the principal or actual offender. *Queen* v. *Ram Soonder Shootar* (1), *Reg.* v. *Kashinath Dinkar* (2), *Empress* v. *Kishna* (3), *Empress* v. *Behala Bibi* (4), and *Queen-Empress* v. *Lalli* (5), referred to.

THIS was a case the record of which the High Court of its own motion called for in the exercise of its powers of revision. The facts are sufficiently stated in the order of the Court.

BRODHURST, J.—Dungar Singh and his wife Dulari were committed to the sessions under ss. 302, 109-302, and 411, of the Indian Penal Code, *i.e.*, they were committed for the offences of murder, abetment of murder, and dishonestly receiving stolen property.

The Sessions Judge apparently struck out the second charge from the charge-sheet, and in lieu of it entered a charge under s. 201 of the Penal Code, as follows:—"At Sumerwa, knowing that Thakur Singh had been murdered, concealed his body, causing evidence of the offence to disappear, with the intention of screening the murderer from legal punishment."

The Judge, concurring with the assessors, found both of the accused not guilty of murder, but "guilty of concealing the body of Thakur Singh, knowing that he had been murdered, intending to screen the murderer from legal punishment."

(1) 7 W. R., Cr. 52
(2) 8 Bom. H. C. Rep., C. C., 126
(3) I. L. R., 2 All. 713.
(4) I. L. R., 6 Calc. 789.
(5) I. L. R., 7 All. 749.

The Judge, concurring with the assessors, found Dungar Singh not guilty of dishonestly receiving stolen property, and, concurring with one assessor, and differing from the other two assessors, he found Dubri guilty of the last-mentioned offence.

The Judge sentenced Dungar Singh to five years' rigorous imprisonment under s. 201, and he sentenced Dulari to seven years' imprisonment under s. 201, and to three years' similar imprisonment under s. 411, the latter sentence to commence on the expiration of the former one.

The boy who was murdered was a distant relative of the accused. He was missed on the morning of the 17th August last. Search was made for him, and the Judge observes :—"On the morning of the 19th the body was found in the ruin of Hazari Singh, which had been previously searched without the body being found. It appears to have been buried, so the neighbouring houses were searched, and in Dungar Singh's house signs of a body being buried were found, and both accused have throughout the inquiry and trial admitted that the body was actually buried in their house. An armlet worth Rs. 3 was on the body, silver bracelets worth Rs. 25 were missing, and also gold earrings worth Rs. 5-8. Dungar Singh was *challaned* on the 19th August, and on the 21st Dulari, in the presence of the head constable and two respectable witnesses, went to her house, and putting her arm far into a pacca drain, produced the four *karras*, which are recognised as those of the boy."

Dungar Singh "declares that next morning his wife showed him the corpse in the house, and he proposed to produce it before the head constable, then in the village, but on his wife saying that she would be charged with the murder, he buried it in the house, and in the night put it into Hazari's ruin."

Dulari "in her subsequent statements to the Magistrate still states that Girwar Singh killed the boy, but that she did not see him do so, and that she found the corpse lying in her house at dawn, and told her husband, who proposed to show it to the head constable, but that she persuaded him not to do so, as the head constable would accuse her of the crime. She states that only the armlet was on the body and no other ornaments, and that she

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alone buried the body, and subsequently threw it into the ruin. Before this Court she prays that whatever punishment be given may be inflicted on her, as if her husband is punished, he will lose his zemindari share. I am of opinion that the circumstantial evidence proves a murder committed by one or both of the accused persons, but that it does not conclusively prove which of them is guilty of the crime. It may have been committed by the wife in the absence of the husband, or by the husband in the absence of the wife, and hence it cannot be brought home to either of the accused persons."

With regard to the charge under s. 201 of the Penal Code that was added in the Court of Session the Judge has observed: —"It may be urged perhaps that that section does not apply to a criminal concealing the evidence of his own crime. I cannot think there is any force in this argument. Every rational system of jurisprudence is careful to distinguish and punish separately each separate step in crime in order that a criminal may have a motive for stopping short even in the midst of criminal acts. A criminal who obliterates all traces of his crime has distinctly taken one step further against public justice than a criminal who does not do so, and should be punished accordingly. I cannot imagine that any person, merely because he is a criminal, has a vested right to defeat the course of justice, which is withheld from innocent persons; nor can I see that a criminal who has escaped conviction for a major crime, by obliterating all evidence of the crime, should be allowed to do this with impunity. I cannot see that any doctrine of merger is applicable, unless the minor crime is distinctly included in the major, and I do not think that a person accused, *e.g.*, of illegal possession of a weapon, could claim an acquittal on the ground that he had committed a murder with that weapon. I have no doubt that the words of s. 201, Indian Penal Code, construed in the strictest manner, do cover the case of a criminal concealing his own crime. If the Legislature meant otherwise, it could and should have said so, but it has not said so, nor do I think it meant so."

I do not feel called upon to express any opinion as to the way in which s 201 of the Indian Penal Code should have been drawn.

All that I conceive I have to do is to decide whether that section does or does not apply to a criminal causing disappearance of evidence of his own crime. The section is contained in Chapter XI, the heading of which is "Of false evidence and offences against public justice." The marginal note of s. 201 is "Causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender." This is a correct abbreviation of the section, and from the wording of the section itself, and for the reasons given by Mr. Justice Lloyd, there is not, in my opinion, any room for doubt that the section applies merely to the person who screens the principal or actual offender. There are several judgments of High Courts in India which support this opinion, and I am not aware of any that are in conflict with it. All of these judgments have not been reported, but it is quite sufficient to refer to the following five rulings—*Queen* v. *Ram Soonder Shootar* (1), *Reg.* v. *Kashinath Dinkar* (2), *Empress* v. *Kishna* (3), *Empress* v. *Behala Bibi* (4), *Empress* v. *Lalli* (5). These rulings extend over a period of about nineteen years, and are by nine Judges of three of the High Courts. It is incredible that all of them can have escaped the notice of the Legislature, and it is therefore reasonable to suppose that the section would have been amended had its meaning been misinterpreted by so many Judges of at least three of the High Courts in India. As, in my opinion, the conviction of Dungar Singh and Dulari under s. 201 of the Indian Penal Code is illegal, I am constrained to annul the convictions and sentences under that section, and to direct that Dungar Singh be released.

I see no reason to interfere with the sentence that has been passed upon Dulari under s. 411 of the Indian Penal Code.

(1) 7 W. R., Cr. 52.
(2) 8 Bom. H. C. Rep., C. C., 126.
(3) I. L. R., 2 All. 713.
(4) I. L. R., 6 Calc. 789.
(5) I. L. R., 7 All. 749.

1886
April 12.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

HARJAS AND OTHERS (DEFENDANTS) *v.* RADHA KISHAN (PLAINTIFF).*

Sir-land—Ex-proprietary tenancy—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 7.

The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.-W. P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as *sir*; and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir*-land in a village to the plaintiff, who, at that time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that, after the sale, he continued in possession of the *sir*-land till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

Held that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N.-W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their ex-proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

Held also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s. 7 of the Rent Act.

THE plaintiff in this suit, on the 29th July, 1879, purchased from Didari, defendant, a one-third share of 39 bighas and 10 biswas of *sir*-land situate in mauza Tawaya, which jointly belonged to Didari and his two brothers, Hazari and Harjas. These two persons were defendants in the Court of first instance. Hazari died subsequently to the passing of the decree of that Court, as likewise Didari. It appeared that at the time of this sale the plaintiff was in cultivatory possession of the land representing Didári's share under a mortgage from the latter, dated the 3rd September, 1877. The plaintiff alleged that he continued in possession till July, 1884, when Didari wrongfully dispossessed him at the

* Second Appeal No 990 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saháranpur, dated the 27th March, 1885, modifying a decree of Munshi Ganga Saran, Munsif of Saháranpur, dated the 6th December, 1884.

instigation of the other defendants, and he claimed, by reason of such dispossession, to recover the land and mesne profits. The defendant Didari set up as a defence that under s. 7 of the N.-W. P. Rent Act he was entitled to possession of the land as an ex-proprietary tenant.

The Court of first instance (Munsif of Saháranpur) held that although the plaintiff had been allowed to remain in possession after the sale, his dispossession and Didari's entry on the land was not wrongful, inasmuch as the plaintiff had not acquired possession by virtue of the sale, and as Didari was entitled to possession as an ex-proprietary tenant from the date of the sale. It found that "there was nothing to show that Didari surrendered or relinquished such right"; and that it was in all probability because he was ignorant of his right, that he did not at once avail himself of it, but allowed the plaintiff to remain in possession. It therefore dismissed the suit.

On appeal by the plaintiff, the District Judge of Sahâranpur held that the defendant Didari was not justified in dispossessing the plaintiff, notwithstanding that he might have acquired the right of an ex-proprietary tenant, and from the time of the sale, inasmuch as the plaintiff had remained in possession for four or five years after the sale, and that Didari's proper course was to apply to the Revenue Court to have it determined that he was an ex-proprietary tenant, and to have his rent fixed, and to recover possession. For these reasons the District Judge gave the plaintiff a decree for possession of the land.

The heirs of Didari and Hazari and the defendant Harjas appealed to the High Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

Shah *Asad Ali*, for the respondent.

STRAIGHT, Offg. C. J.—This is a suit brought by the plaintiff-respondent upon the strength of a deed of sale dated the 29th July, 1879, to recover possession of one-third of a ten-biswansis share, which had been conveyed to him by the sale-deed executed by Didari, who was one of the three sharers who owned that ten bis-

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wansis share. The defence to the suit was that the land claimed by the plaintiff was the *sir*-land of the defendant, and that at the time of the sale of the one-third biswansis share he held it as his *sir*, and that by the operation of law he became the ex-proprietary tenant of the land. Now it is conceded that the defendants are the ex-proprietary tenants of the land in suit, and apparently the only contention seriously put forward on behalf of the plaintiff is, that because for four or five years the defendant failed to assert his ex-proprietary tenant rights, he is debarred from doing so now. But such a contention could only be a well founded one had there been any provision either in the Limitation Act or the Rent Act creating such a disability. It has also been urged for the plaintiff that, inasmuch as he was in possession of this land as mortgagee at the time of sale, and continued to hold it afterwards, Didari, his vendor, did not "*hold*" the land as his *sir* at the time of the sale of his proprietary interest within the meaning of s. 7 of Act XII of 1881. I do not concur in the construction which the learned pleader for the respondent places upon this section. I think that the words "*held by him as sir*" must be construed to mean land belonging to him, or to which he was entitled, as *sir*. In my opinion, we ought to give as liberal an interpretation as is consistent with the canons of construction to these words. Otherwise it is easy to foresee how the door may be opened to the very mischief at which the Act aimed, by sales in future being preceded by a possessory mortgage of the land subsequently conveyed, so that the purchaser should be in possession of the *sir* at the date of sale, and thus be able to say that he and not the ex-proprietor held it at that time. Thus the provisions of the statute would be easily evaded. I think that this appeal must be decreed, and the decree of the first Court restored with costs in all Courts.

MAHMOOD, J.—I entirely concur in the order proposed by the learned Chief Justice, but I wish to add a few words. It is admitted by the plaintiff that the defendants are in possession of the land, which is the subject-matter of the suit. It is also granted that the only title on the basis of which the plaintiff claims this land, is the sale-deed dated the 29th July, 1879. It seems to me that upon this state of things much less depends upon what the defendants can show than upon the title which the plaintiff can show.

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The learned District Judge seems to take it for granted that Didari was an occupancy-tenant, but had ceased to be so by the operation of some rule of law, of which I am not aware, and which the learned Judge does not mention in his judgment. If we were to allow the judgment of the learned Judge to stand, we would be turning out of possession a person who is entitled to hold possession of the land sold by the operation of law. I entirely concur in, and fully accept, the interpretation placed by the learned Chief Justice upon s. 7 of Act XII of 1831. It seems to me that the plaintiff's title to the possession of the land fails, and his case must therefore fail.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1886 *April* 14.

HAZARI AND OTHERS (DEFENDANTS) *v.* CHUNNI LAL (PLAINTIFF).

Surety—Act IX of 1872 *(Contract Act), ss.* 134, 137, 139, *and* 141.

A decree holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent, shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

Held that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favour of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed.

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* Second Appeal No. 1162 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 22nd May, 1885, reversing a decree of Maulvi Muhammad Nasirullah Khan, Subordinate Judge of Jaunpur, dated the 15th January, 1885.

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THE plaintiff in this case claimed Rs. 719-6-0. It appeared that the plaintiff, Chunni Lal, held a decree for money against certain persons and took out execution of it. In the course of the execution-proceedings he agreed to accept payment of the decretal amount in eleven annual instalments, the defendants in the present suit giving him a bond in which they agreed to pay the debt in case of default on the part of the judgment-debtors, and mortgaged certain immoveable property as collateral security. The judgment-debtors paid five instalments and then made default. In the present suit Chunni Lal sought to recover the amount of the decree from the sureties. At the time of suit the decree had become time-barred, Chunni Lal having omitted to apply for execution. The terms of the surety bond are stated in the High Court's judgment.

The first Court dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree.

It was contended in second appeal on behalf of the defendants, with reference to the terms of the surety-bond, that the sureties had been discharged in law by the conduct of the creditor, in allowing the decree to become time-barred.

Mr. *C. H. Hill*, for the appellants.

Mr. *T. Conlan* and Babu *Joyindro Nath Chaudhri*, for the respondent.

OLDFIELD and TYRRELL, JJ.—Having carefully examined the terms of the surety-bond, the basis of this action, we are of opinion that they amount to this, that the creditor having given his debtor time to pay Rs. 816-3-6, costs, and interest at 8 annas per cent., the amount of his judgment-debt, the debtor covenanted to pay this sum in eleven years by engaging, on the occurrence of a single default, to execute his decree for the whole sum remaining due under it, on the expiry of one month from the date of the default, and the sureties bound themselves to guarantee satisfaction of the decree debt, in the event of failure of payment, by the mode indicated above. In other words, the debtors were to have time, and to make punctual periodical payments, failure in punctuality to be necessarily followed within one month by execution of the decree on the decree-holder's part, the sureties becoming then and thereafter responsible for any eventual failure in full satisfaction

of the decree. The words of the deed were :—" In case of default of paying the instalments, the whole decretal money, with costs, and interest at 8 annas per cent., *shall be* executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as surety of the judgment-debtors to Rs. 816-3 6, with all the costs of the Court and interest." The first and necessary step to be taken on occurrence of a default was, within a month from its date, execution of his decree on the part of the creditor. The language of this part of the covenant is peremptory, and imports much more than the usual agreement under such circumstances, that the decree-holder may or is at liberty to execute his decree, if he pleases, on a default. Instalments were regularly paid for five years, down to the 20th April, 1879; then payments ceased, and the decree-holder took no steps against his judgment-debtors to execute his decree which is now defunct by lapse of time. He sues the sureties for the unpaid balance due on the decree, with interest to the date of his suit, instituted in November, 1884. Having failed in the Court of first instance, he obtained a judgment from the District Judge in appeal; and the sureties seek in second appeal to get that decree set aside. On our reading of the peculiar terms of the agreement set out above, we are satisfied that the appeal should prevail. It must be conceded that the legal consequence of the respondent's omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties, then, would, under the rule of s. 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (s. 137, *id.*) "mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than "mere forbearance" in favour of his debtors. And we hold that by his failure to carry out this express part of his agreement, he did an act (s. 139, *id.*) inconsistent with the equities of the sureties, and omitted to do an act which his

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duty to the sureties (under the agreement) required him to do, whereby the eventual remedy of the sureties themselves against the principal debtors must necessarily have been impaired. We are also of opinion that by allowing his decree to become incapable of enforcement, the respondent deprived the sureties of the benefit of the decree, which was a subsisting security in his hand at the time when the contract of suretyship was entered into, and the loss of this security, to the benefit of which the sureties were entitled, through the act of the creditor, would operate to the discharge of the sureties to the extent of the value of that security (s. 141, *id.*). In this view of the facts of the agreement and of the law applicable to them, we must set aside the decree of the lower appellate Court, and, allowing this appeal, dismiss the respondent's suit with all costs.

Appeal allowed.

1886 *April* 28.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAM SAHAI AND OTHERS (DECREE-HOLDERS) *v.* THE BANK OF BENGAL (JUDGMENT-DEBTORS).*

Execution of decree—Costs—Reversal of decree—Refund of costs recovered by execution—Interest.

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

Held that the appellant was entitled to the interest claimed on the refund of costs. *Forester* v. *The Secretary of State for India in Council* (1) referred to.

ONE Gur Prasad sued for the sale of mortgaged property, impleading the mortgagor and the Bank of Bengal, which had purchased the mortgaged property at an execution-sale. The Subordinate Judge of Cawnpore, by whom the suit was tried, dismissed the claim for the sale of the property, awarding the Bank its costs, with interest. The Bank recovered these costs, amounting to Rs. 642, that is, Rs. 633 principal and Rs. 9 interest, in execution of the decree. The plaintiff appealed from the decree of the

* First Appeal No. 41 of 1886, from an order of Munshi Rai Kulwant Prasad, Subordinate Judge of Cawnpore, dated 14th December, 1885.

(1) I. L. R., 3 Calc., 161.

Subordinate Judge to the High Court, which, on the 4th May, 1885, gave the plaintiff a decree for the sale of the property, and awarded him costs. The heirs of the plaintiff applied to obtain in execution of the High Court's decree the refund of the sum paid to the Bank under the decree of the Court of the Subordinate Judge on account of costs—that is to say, of the sum of Rs. 642, together with interest at the rate of Rs. 6 per cent per annum. The Bank objected to paying interest on the refund claimed, and this objection was allowed by the lower Court. The decree-holder appealed to the High Court.

Pandit *Nand Lal* and Pandit *Moti Lal*, for the appellants.

Pandit *Nand Lal* relied on *Jaswant Singh* v. *Dip Singh* (1) and *Forester* v. *The Secretary of State for India in Council* (2).

Mr. *G. T. Spankie*, for the respondent, referred to *Rodger* v. *The Comptoir d' Escompte de Paris* (3) as expressly deciding the point whether interest should be granted on refund of costs. The cases cited for the appellant are not in point. The first does not relate to costs, and in the second *Rodger* v. *The Comptoir d' Escompte de Paris* is distinguished.

BRODHURST and TYRRELL, JJ.—Apart from authority, which is strong and clear on the general question of restitution, we are satisfied that, in common justice and fairness, the appellants are entitled to the moderate interest they claim on their money, which has now to be refunded to them by the respondent.

This consists of a principal sum of Rs. 642, of which Rs. 9 were interest, recovered wrongfully in a former stage of the litigation by the respondent from the appellants as compensation for the respondent's costs. The Court below has not understood the rule laid down in *Forester* v. *The Secretary of State* (2). It is of course true that a Court executing a decree for costs cannot award interest on those costs not given by the decree. But the case before us is quite different. The question is not of awarding interest to the successful appellant on the costs given him by the decree under execution, such interest being not awarded on the decree. The question is, whether interest may or not be given on the sum

(1) I. L. R., 7 All. 432.
(2) I. L. R., 3 Calc., 161.
(3) 7 Moo P. C. C., N. S., 314; L. R., 3 P. C. 465.

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wrongly obtained, as described above, by the respondent from the appellant, restitution of which is now secured by the operation of the final decree in the case. We allow the appellant's claim and decree his appeal with costs.

Appeal allowed.

1886 *April* 30.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JUGAL KISHORE (PLAINTIFF) *v.* HULASI RAM AND ANOTHER (DEFENDANTS)*.

Partnership—Joint Hindu family—Suit by one member for debt due to family firm.

In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks (1)"

Held that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

THE plaintiff in this case, Jugal Kishore, and his five sons were members of a joint Hindu family, and carried on jointly an ancestral money-lending business. The plaintiff sued the defendants for money lent by the firm to them. The plaintiff was examined, and stated that he had made his sons the owners of the firm, retaining his interest in it to profits and losses, and that by reason of increasing infirmities he had ceased to take an active part in the management of the affairs of the firm, and that the active partners were his sons. Upon this the defendants objected that the plaintiff was not competent to sue alone, and his sons should have been joined as plaintiffs, and not having been so joined, the suit should be dismissed. The Court of first instance disallowed this objection, and trying the suit on the merits, dismissed it. The plaintiff appealed, and the defendants contended in support of the decree that the suit ought to have been dismissed, "because, on the showing of the plaintiff, the contract was made with his firm, and his partners were not parties to the litigation."

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* Second Appeal No. 1350 of 1885, from a decree of T. R. Redfern, Esq., District Judge of Agra, dated the 4th May, 1885, affirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 24th December, 1884.

(1) "Proprietors."

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The lower appellate Court held that, as the plaintiff was not the managing member of the family firm, "the ordinary rule which requires a suit relating to the business of a partnership to run in the names of all the partners, ought to be enforced." It therefore dismissed the appeal.

The plaintiff appealed to the High Court upon the ground, amongst others, that the plaintiff, as head of the family, was entitled to sue on its behalf.

Mr. *W. M. Colvin*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

BRODHURST and TYRRELL, JJ.—We cannot interfere. The appellant stands in this position, that he has declared the firm to which the debt is due to be ancestral, and he has asserted that the control of its business is in the hands of his sons jointly. He calls them "maliks (1)." From either point of view, then, he cannot sustain this suit in his own individual capacity. His sons are his partners in the ancestral business, and he is not the managing member or proprietor.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

1886 *April* 2.

KALIAN BIBI AND ANOTHER (PLAINTIFFS) *v.* SAFDAR HUSAIN KHAN AND OTHERS (DEFENDANTS). *

Pardah-nashin—Civil Procedure Code, ss. 129,136—*Discovery of documents.*

In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them

* First Appeal No. 154 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th April, 1885.

(1) "Proprietors."

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personally, praying that the Court would have it verified in any manner thought proper, provided that their *pardah-nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiff, and no sufficient ground for non-compliance had been shown.

Held, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s 129 of the Code, that looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *Abdul Majid*, Mr. *J. Simeon*, and Maulvi *Mehdi Hasan*, for the appellants.

Mr. *G.E. A. Ross* and Pandit *Nand Lal*, for the respondents.

STRAIGHT, Offg. C. J., and TYRRELL, J.—The appellants, two Muhammadan *pardah* ladies, brought a suit in the District Judge's Court at Gorakhpur, on the 10th June, 1881, for recovery of landed property by their right of inheritance to part of the estate of one Muhammad Wazid. The suit was dismissed as barred by limitation. But in first appeal it was remanded for re-trial under s. 562, Civil Procedure Code. When the case was restored in the Court below, and came on for trial, the Judge made an order under s. 129, Civil Procedure Code, requiring the plaintiffs-appellants to "produce with an affidavit all the papers connected with the points at issue in the case which were or had been in their possession or under their control." After some ineffectual proceedings, the plaintiffs were ordered to file their affidavit peremptorily on the 1st April, 1885. On that date an affidavit was filed on behalf of the plaintiffs by their mukhtar and brother Kazi Muhammad Ikram Ali, with a list of their documentary evidence. This mukhtar appeared under a special power of attorney, executed and registered in this behalf under the hands of the two ladies on the 27th and 28th March, 1885. The Judge found the affidavit and list of the 1st April defective, because (i) it was not made personally by the plaintiffs, (ii), because it disclosed only documents connected with the issues on the record, and (iii) because it disclosed only documents in possession of the ladies, and failed to disclose

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or mention documents once, but not at present, in their possession. Therefore the Judge gave the plaintiffs further time to the 16th April, 1885, to amend those defects. On the 15th April, the plaintiffs filed before the Judge an affidavit purporting to be made by them personally, praying that "the Court may have it verified in the manner it thinks proper, provided petitioners' *pardah-nashin* is not interfered with." On the 27th April the Judge disposed of that petition and of the suit by his order which is now appealed to us. It runs as follows:—"The order of this Court not having been complied with, although ample opportunity has been given to the plaintiffs, and no sufficient ground for non-compliance having been shown, I have no alternative, much as I regret the necessity, but to exercise the power given me by s. 136, Act XIV of 1882, and to direct that the suit be dismissed for want of prosecution, and I now make an order to that effect, with costs, and the usual interest thereon."

Without going into the question of the sufficiency or insufficiency of the action of the plaintiffs with regard to the orders made under s. 129 of the Court, it is enough here to say that, looking at the disabilities of the plaintiffs and the circumstances of their suit, it appears to us that the case was not one in which it was expedient to enforce the liability to which they may have exposed themselves under the peculiar provisions of s. 136 of the Code.

We therefore allow the general plea of the appellants, and, decreeing this appeal, remit the case for trial to the Court below. The costs here will be costs in the cause.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

BEHARI LAL (PLAINTIFF) v. HABIBA BIBI AND OTHERS (DEFENDANTS).*

1886 April 16.

Pardah-nashin—Execution of deeds.

A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah-nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorized by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-

* First Appeal No 199 of 1885, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Azamgarh, dated the 31st July, 1885.

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-attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executants of the bond said were their respective wives, and that those women acknowledged they had made the power-of -attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond.

Held that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it.

Buzloor Ruheem v. *Shumsoonnissa Begum* (1), *Ashgar Ali* v. *Debroos Banoo Begum* (2), and *Sudisht Lal* v. *Sheoburat Koer* (3) referred to by MAHMOOD, J.

THE plaintiff in this case claimed the amount due on a bond, dated the 16th September, 1873, from Rafi-ud-din Ahmad, and his wife Habiba Bibi, and Salima Bibi, the wife of Nurul Hasan, by whom the bond purported to be executed. He also claimed the sale of certain zamindari property mortgaged in the bond. This property was property which the two female defendants, who were sisters, had inherited from their father. The bond purported to be executed by Habiba Bibi "by the pen of Rafi-ud-din Ahmad," her husband, and by Salima Bibi "by the pen of Nurul Hasan," her husband. It was registered on the 27th September, 1873, by one Maula Khan, under a *mukhtar-nama*, or power-of-attorney, which purported to be executed by Rafi-ud-din Ahmad, Habiba Bibi and Salima Bibi, and was authenticated by the Sub-Registrar, who had issued a commission for the examination of the ladies as to the voluntary nature of the execution of the power by them. The defendant Rafi-ud-din Ahmad did not defend the suit. It was defended by the female defendants, who pleaded that they had not executed the *mukhtar-nama*, or the bond, and had no knowledge whatever of those deeds and had not benefited in any way from the money advanced under the bond.

The Subordinate Judge of Azamgarh, by whom the suit was tried, dismissed it in respect of the female defendants. He found that they had no knowledge of the *mukhtar-nama* or the bond, and

(1) 11 Moo. I. A. 551; 8 W. R., P. C. 3.
(2) I. L. R., 3 Calc. 324.
(3) I. L. R., 7 Calc. 245; L. R., 8 Ind. Ap. 39.

had not benefited in any way from the money advanced under the bond. The plaintiff appealed to the High Court.

Munshi *Kashi Prasad* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

STRAIGHT, Offg. C. J.—This was a suit brought by the plaintiff Behari Lal upon a bond dated the 16th of September, 1873, for Rs. 6,700, purporting to have been executed by one Rafi-ud-din, for himself and for his wife Habiba Bibi, and by one Nurul Hasan on behalf of his wife Salima Bibi. The two ladies were the daughters of Fakhr-ud-din Ahmad, and Rafi-ud-din was his nephew, and the property said to have been charged admittedly came to the hands of the obligors upon the death of Fakhr-ud-din, to whom it had belonged. The bond of the 16th of September, 1873, was, as I have said, not signed by either Habiba Bibi or Salima Bibi, and it was subsequently presented for registration by one Maula Khan, who professed to be authorized in that behalf by a power of attorney dated the 17th September, 1873. Now the bond can only be given in evidence and held to be binding against the ladies, *qua* their immoveable property charged therein, if it was duly registered, and the question whether it was so registered turns upon whether the power-of-attorney was in fact made by them, with their conscious consent and full knowledge and comprehension of what they were authorizing Maula Khan to do. The Subordinate Judge has found that the bond to the plaintiff was not proved to have been executed with the knowledge of the ladies ; that they are not shown to have benefited by it in any way ; and, as I understand him, he also rejected the power-of-attorney as not binding on them.

It is upon this latter point that I am prepared to deal with the appeal and dispose of it. Now there can be no doubt—and many Privy Council rulings are to be found approving the principle—that in cases such as that before me, in which the interests of *pardah-nashin* women are concerned, those who seek to affect them with liability under an instrument of the kind sued on here, are bound to prove that they had knowledge of the nature

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and character of the transaction into which they are said to have entered, that they had some independent and disinterested adviser in the matter, and that they put their hands to the document relied on, or authorized some other persons to execute it for them, fully understanding what they were about in doing so. In the present case all that the plaintiff has proved by one witness, Imam-ud-din, is that upon a particular day he went to the residence of the ladies, with whom he was not personally acquainted, nor did he know their voices. He says their were two women behind a *pardah* who were said by their husbands, Rafi-ud-din and Nurul Hasan, to be their respective wives, and that these persons ackowledged they had made the power of attorney. Now I will go the length of saying that even if the ladies behind the *pardah* were in fact the two defendant Musammats, I should not, in reference to the principles already enunciated, be prepared to hold that this is enough to bind them. I think it was for the plaintiff—who is seeking to bring their property to sale on the strength of a transaction with these two *pardah-nashin* ladies—to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. This, in my opinion, he has wholly failed to do, and, under such circumstances, I think the lower Court was right in dismissing the suit, and I therefore dismiss the appeal with costs. With regard to the application made to-day for the admission of the *mukhtar-nama*, which was rejected below, it is unnecessary to say more than that I have dealt with the case as if it were in evidence.

MAHMOOD, J.—I am of the same opinion. I entirely concur with the learned Chief Justice in his estimate of the evidence. It is an estimate which I, from my acquaintance with the facts of Muhammadan life to which it refers, accept as in keeping with the rulings of the Privy Council in such matters, which have done for the *pardah-nashin* women what their life requires, which is, that they should be placed, by analogy, on a footing somewhat similar to that of persons *non compotes mentis*. The doctrines of equity which relate to such persons have been stated in s. 228 of Story's work on Equity Jurisprudence, where it is laid down that "Courts of equity deal with the subject upon the most enlightened principles, and

watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wher ever, from the nature of the transaction, there is not evidence of entire good faith (*uberrimæ fidei*), or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of equity will set it aside, or make it subservient to their just rights and interests." I desire to embody this passage in my judgment for the benefit of the subordinate Courts, to which, generally speaking, such works as Story's are not accessible ; and for the same reason I wish to read certain passages from the judgments of the Lords of the Privy Council in order to show the manner in which their Lordships have from time to time applied the doctrine of equity to *pardah-nashin* ladies. The leading case upon the subject is *Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), where their Lordships made the following observations (p 585)—" The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Muhammadan and a Hindu woman ; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is no doubt true that a Musulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition ; but the Hindu law is equally indulgent in that respect to the Hindu wife. It may also be granted that in other respects the Muhammadan law is more favourable than the Hindu law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Musulman woman of rank, like the Hindu, is shut up in the *zanana*, and has no communication, except from behind the *pardah*, or screen, with any male persons, save a few privileged relations or dependants ; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be

(1) 11 Moo. I. A. 551, 8 W. R., P. C. 3.

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presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah-nashin*, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him". The principles upon which these observations proceed must not be lost sight of in connection with such cases. Again, in *Ashgar Ali* v. *Debrôos Banoo Begum* (1), which was also a case in which a Muhammadam *pardah-nashin* lady was concerned, their Lordships made observations which seem to me to be very pertinent to cases like the present. Their Lordships said (p. 327) :—" It is incumbent on the Court, when dealing with the disposition of her property by a *pardah-nashin* woman, to be satisfied that the transaction was explained to her, and she knew what she was doing, and especially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property." There are many other cases to be found in the Reports which lay down the same doctrine, but I will cite only one more passage from the judgment of their Lordships in a recent case—*Sudisht Lal* v *Sheobarat Koer* (2), in which the facts were somewhat similar to those of the present case :—" Their Lordships desire to observe that there is no satisfactory evidence that this *mukhtar-nama* was explained to the defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by *pardah-nashin* ladies, it is requisite that those who reply upon them should satisfy the Court that they had been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground ..... If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that under this power-of-attorney she would be bound by his acts, as being within the scope of his authority. But it would have to be shown, not only that he borrowed the money, but that

(1) I. L. R., 3 Calc. 324.
(2) I. L. R., 7 Calc. 245, L. R., 8 Ind. App. 39.

it was borrowed for her." These passages seem to me to be closely applicable to the circumstances of this case.

With reference to the observations of the learned Chief Justice, I have only to add that in all these transactions, the important thing to see is what was actually done. In the present case there is nothing to show that this large sum was ever utilized for the ladies' benefit, and there is no satisfactory evidence to show that they took part in the execution of the *mukhtar-nama*, or understood its contents, or that they were aware of the existence of the bond, or that it was executed with their consent. The findings of the lower Court are satisfactory, and I would not interfere.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

KOJI RAM (PLAINTIFF) *v* ISHAR DAS AND ANOTHER (DEFENDANTS *

1886
April 17.

Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Act XV of 1877 (*Limitation Act*), *sch* ii, *Nos* 62, 97, 120—*Suit for money had and received for plaintiff's use—Suit for money paid upon an existing consideration which afterwards fails.*

Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1,595, the pre-emptor decree-holder, in August, 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1,595 to the judgment-debtors out of court, and filing a receipt given by them for the money. This application was ultimately struck off. In April, 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to Rs. 1,994, which was to be deposited in court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree-holder asigned to *K* his right to recover from the judgment-debtors the sum of Rs. 1,595 which he had paid to them in August, 1880. In December, 1883, *K* sued the judgment-debtors for recovery of the Rs 1,595 with interest.

Held that No. 62 of the Limitation Act did not govern the suit, but that No. 97, and, if not, No. 120, would apply, and the suit was therefore not barred by limitation.

THE suit out of which this appeal arose was brought under the following circumstances:—In February, 1880, one Ram Lal obtained a decree for pre-emption in respect of certain property,

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* Second Appeal No 1264 of 1885, from a decree of W. R Barry, Esq., Additional Judge of Aligarh, dated the 30th July, 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 22nd May, 1884.

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conditional upon payment of Rs. 1,595 to the purchasers. This decree was upheld on appeal by the District Judge in April, 1880, and the purchasers preferred a second appeal to the High Court. Pending this appeal, Ram Lal, in August, 1880, applied for possession of the property in execution of the decree in his favour, alleging that he had paid the sum of Rs. 1,595 to the judgment-debtors out of court, and filing a receipt given by them for the money. This application was ultimately struck off, in consequence of the applicant's failure to comply with an order directing him to file a copy of the decree. After this the High Court, in April, 1881, gave judgment in the appeal, which it so far allowed as to increase the amount to be paid by the pre-emptor to Rs. 1,994-4, which sum was to be deposited in court within one month from receipt of the decree in the lower Court. Ram Lal did not pay the balance thus directed to be paid to the purchasers, and the decree for possession accordingly became void. In February, 1882, Ram Lal assigned to the plaintiff in the present suit, Koji Ram, his right to recover from the purchasers the sum of Rs. 1,595 which he had paid to them in August, 1880. In March, 1882, the plaintiff made an application in the execution-department for recovery of the amount; but the purchasers objected that he was not a "representative" of Ram Lal within the meaning of s. 244 of the Civil Procedure Code, and therefore could not take proceedings in the execution-department. This objection was allowed; and the plaintiff in consequence brought the present suit in December, 1883, for recovery of the Rs 1,595, with interest thereon, in the Court of the Subordinate Judge of Aligarh. That Court decreed the claim for Rs. 1,595, but disallowed the claim for interest. The defendants appealed to the District Judge of Aligarh. That Court held that the suit was barred by limitation, with reference to No. 62, sch. ii of the Limitation Act, as a suit "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use," the period prescribed for which was three years from the date when the money had been received by the defendants.

In second appeal by the plaintiff it was contended on his behalf that the District Judge was wrong in applying to the suit

the provisions of No. 62 of the Limitation Act, and that the limitation properly applicable was that provided by No. 120.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

OLDFIELD and TYRRELL, JJ.—We are of opinion that art. 97 of the Limitation Act may be applied to this suit, and, if not, art. 120 would apply. The suit is not governed by art. 62, as the Judge considers. In the above view the suit is not barred by limitation, and we set aside the decree of the lower appellate Court, and remand the case for trial on the merits. Costs to follow the result.

Appeal allowed.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

1886
April 20.

HABIB-UN-NISSA AND ANOTHER (PLAINTIFFS) *v.* BARKAT ALI AND ANOTHER (DEFENDANTS.)*

Muhammadan law—Pre-emption—Acquiescence in sale—Relinquishment of right.

According to the Muhammadan law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadan law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves.

Held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it.

THE plaintiffs in this case, Muhammadans, claimed to enforce the right of pre-emption in respect of the sale of a house and certain land appertaining thereto. The right was founded on Muhammadan law. The vendor, Barkat Ali, and the vendee, defendants, were Muhammadans, and the property was sold on the 27th October, 1883. On the day of the sale the vendee gave the plaintiffs an agreement in writing to sell the property to them, the terms of which were as follows:—"I have to-day purchased the house of

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* Second Appeal No. 1305 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 24th June, 1885, confirming a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Meerut, dated the 15th April, 1885.

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Jalal-ud-din from Barkat Ali : counting from to-day, if (plaintiffs) within one year pay me what I have paid for the house, I will sell i to them, provided that they purchase for their own use and residence and not for sale to another."

The defence to the suit was that the plaintiffs had not, as required by the Muhammadan law of pre-emption, made the "*talab-i-mawasabat*," or immediate demand, and had therefore lost their right, and that they had also lost it, according to the same law, by accepting from the vendee the agreement set out above, and thereby acquiescing in the sale to him.

The Court of first instance dismissed the suit on the ground that the plaintiffs had not made the "immediate demand." The plaintiffs appealed, and the lower appellate Court affirmed the decree of the first Court on that ground, and on the further ground that they had relinquished their right, by accepting the agreement from the vendee. The plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Durga Charan*, for the appellants.

Mr. *T. Conlan* and Maulvi *Abdul Majid*, for the respondents.

MAHMOOD, J.—Having heard the learned pleader for the appellants, I am of opinion that the appeal should be dismissed with costs.

The suit was one for pre-emption, arising out of a sale made on the 27th October, 1883, in favour of Abdul Rahim, defendant-respondent, by one Barkat Ali, the other defendant-respondent. The pre-emptors are two ladies, who claim pre-emption under the Muhammadan law. The questions of law to be considered are two, namely,—(i) whether the "*talab-i-mawasabat*," or immediate demand, had been properly made as required by the Muhammadan law; (ii) if it was, have the plaintiffs relinquished their right by entering into the agreement dated the 27th October, 1883, with Abdul Rahim?

This agreement was made on the same date as the sale, and thereby the purchasers agreed to sell the property to the plaintiffs pre-emptors any time within a year, and if the latter paid the price and purchased it for themselves. Now, according to the Muham-

madan law, if the pre emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right. Mr. Baillie, in his celebrated *Digest of Muhammadan Law*, at page 499, which reproduces a passage of the Fatawa Alamgiri, states the law as follows :—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale, as, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or, in like manner, when he has made an offer for the house to the purchaser ; or has asked him if he will give it up to him ; or has taken it from him on lease, or in *moozaraut*—all this with knowledge of the purchase."

This passage is conclusive, and leaves no doubt that by the very fact of their taking the agreement referred to above, the plaintiffs have relinquished their right of pre-emption and are precluded from enforcing it.

In this view of the question it is unnecessary to consider the first question. I would dismiss the appeal with costs.

TYRRELL, J.—I am quite of the same opinion.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1886 *April 27.*

ZAINAB BEGAM (PLAINTIFF) *v.* MANAWAR HUSAIN KHAN AND ANOTHER (DEFENDANTS.)*

Civil Procedure Code, ss. 556, 558—Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.

In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence

* First Appeal No. 39 of 1886, from an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 19th September, 1885.

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when the appeal was called on for hearing. The Court rejected the application on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

Held that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.

THIS was a first appeal from an order passed by the Subordinate Judge of Moradabad, under s. 558 of the Civil Procedure Code, refusing to re-admit an appeal. The appellant, Musammat Zainab, was plaintiff in the suit which was dismissed by the Court of first instance (Munsif of Amroha). She appealed from the Munsif's decree to the District Judge of Moradabad, who transferred the appeal to the Subordinate Judge. The appellant failed to appear either on the day fixed by the Subordinate Judge for the hearing of the appeal, or on the subsequent days to which the hearing was adjourned. Instead, however, of dismissing the appeal for default under s. 556 of the Civil Procedure Code, the Subordinate Judge tried it and dismissed it upon the merits. Subsequently the appellant applied to the Subordinate Judge, under s. 558, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. This application the Subordinate Judge rejected, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

On this appeal it was contended for the appellant that the Subordinate Judge was not justified in rejecting her application, without inquiry into the truth or otherwise of the allegations made therein regarding the cause of her absence at the hearing of the appeal.

Babu *Ratan Chand*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

BRODHURST and TYRRELL, JJ.—The Subordinate Judge, as a first appellate Court, had the appellant's appeal before him. On the day fixed for hearing, and on adjourned dates, the appellant did not attend in person or by pleader. The Subordinate Judge then had but one legal course open to him—to dismiss the appeal in default (s. 556). It was illegal to try the appeal on the merits.

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The judgment given in this way is a nullity, and must be cancelled: its existence therefore was and is no bar to the re-admission of the appellant's appeal (s. 558), if it was not barred by limitation or otherwise inadmissible. We must allow this appeal, and direct the restoration to the file of the application for re-admission under s. 558 on the merits, the costs of this appeal being costs in the cause.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

1886 *April 28.*

LAL SINGH AND ANOTHER (DEFENDANTS) *v.* DEO NARAIN SINGH AND OTHERS (PLAINTIFFS). *

Hindu Law—Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.

The rule enunciated by the Privy Council in *Muddun Thakoor* v. *Kantoo Lall* (1) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, *i.e.*, to debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

THE three plaintiffs in this case were the sons of Ram Dihal, the first defendant, and on the 3rd October, 1883, when the suit was instituted, they were, so it was stated, aged respectively as follows:—Deo Narain Singh, 23; Ram Narain Singh, 18 years and 2 months; Jagat Narain Singh, 15 years and 2 months. On the 12th December, 1864, Deo Narain alone having been born, Ram

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* Second Appeal No. 286 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 30th January, 1885, reversing a decree of Maulvi Muhammad Nasir-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd December, 1883.

(1) 14 B. L. R. 187; L. R., 1 Ind. Ap. 333. (2) I. L. R., 3 Calc. 148.

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Dihal made a conditional sale of two annas out of a four annas ancestral zemindari share in favour of one Naipal Singh for Rs. 1,200. The consideration given by the conditional vendee was that he paid off some prior incumbrances created by Ram Dihal, and also gave him a sum in cash. The two annas were to be held to be sold if the Rs. 1,200 were not re-paid by the 25th June, 1877. On the 28th November, 1871, Ram Narain Singh and Jagat Narain Singh then having been born, Ram Dihal sold to the other defendants in this suit the entire four annas share, the consideration being Rs. 1,200, left with the vendees to pay off the conditional sale of 1864, Rs. 232 due to the vendees under a mortgage, and Rs. 1,500 in cash. The plaintiffs sued to set aside this sale to the extent of three annas, upon the ground that it was made without legal necessity and for immoral purposes, and that Ram Dihal had no power to sell the whole property. The defendants pleaded, among other matters, that they gave good consideration for the sale, and that, as regards the sum in cash handed over to Ram Dihal, it was taken for the necessary expenses of the family. The Court of first instance (Subordinate Judge of Jaunpur), holding that the *onus* lay on the plaintiffs to prove that the sale was made for improper purposes, and that the money had been taken for necessary purposes of the family, dismissed the suit. On appeal by the plaintiffs the District Judge of Jaunpur, holding that it lay with the defendants to establish the necessity for the sale, reversed the first Court's decree and decreed the claim of the plaintiffs.

The defendants appealed to the High Court, contending that the District Judge was wrong in placing the burden of proof on them, and that it was for the plaintiffs to acquit themselves of their obligation under the Hindu law to pay their father's debts, by showing that they were contracted for purposes which, under that law, were not binding upon them.

Mr. *T. Conlan*, Munshi *Hanuman Prasad* and Munshi *Kashi Prasad*, for the appellants.

Pandit *Ajudhia Nath* and *Pandit Sundar Lal*, for the respondents.

STRAIGHT, Offg. C.J., and TYRRELL, J. (After stating the facts, the judgment continued):—It seems to us that the principle enun-

BENGAL SECRETARIAT

ciated by their Lordships of the Privy Council in *Suraj Bunsi Koer's Case* (1) as to the effect of an earlier decision of that tribunal in *Muddun Thakoor* v. *Kantoo Lall*, (2) must be our guide in the present instance. It is as follows :—"That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." It will be seen from this passage that where an antecedent debt is the consideration for a sale by the father of the ancestral property, or it is charged by him to raise money to pay off an antecedent debt, it rests with the sons to show that such debt was contracted for immoral purposes to the knowledge of the vendee or mortgagee. But it is to be observed that this rule is limited to antecedent debts, that is to say, debts contracted before the sale or mortgage sought to be impeached by the sons ; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. As we understand it, the distinction drawn by their Lordships is founded on the view that while in the one instance the vendee or mortgagee is not to "be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate," on the other hand, "he may reasonably be expected to prove the circumstances of his own particular loan"—*Hunooman Pershad Panday's Case* (3). The authorities therefore seem to come to this, that in those cases where a person buys ancestral estate or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal

(1) I. L. R., 3 Calc. 148. (2) 14 B. L. R. 187 ; L. R., 1 Ind. Ap. 333.
(3) 6 Moo. I. A. 419.

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necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

Adopting this rule and applying it to the present case, it is obvious that the Judge below in dealing with it did not appreciate the distinction to be drawn as indicated above, and that his decison does not meet the difficulties of the position. It seems to us therefore that the proper course for us to adopt is to remand the following issues under s. 566 of the Code for determination :—

1. As to the Rs. 1,200, and Rs. 232 antecedent debts, part of the consideration for the sale to the defendants, have the plaintiffs established that those debts were contracted for immoral purposes, and that at the time the sale was impeached the defendants had notice they were so contracted?

2. As to the Rs. 1,500 paid in cash to Ram Dihal by the defendants, have they proved that they made reasonable and proper inquiries before handing it over, and that they did it believing it was required for the legal necessities of the joint family of which the plaintiffs were members, and that Ram Dihal, as managing member and head, required it for purposes of the joint family?

The findings, when recorded, will be returned into this Court, with ten days for objections from a date to be fixed by the Registrar.

Before Mr. Justice Mahmood and Mr. Justice Oldfield.

1886 *April* 28.

MUHAMMAD SALIM (PLAINTIFF) *v.* NABIAN BIBI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, s. 13—*Res judicata—Dismissal of suit under s.* 10, *cl.* ii, *Act VII of* 1870 (*Court Fees Act*)—*Dismissal of suit for misjoinder—Dismissal of suit "in its present form"*

The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*ba haisiyat maujuda*), upon two grounds: first, with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit.

* Second Appeal No. 1366 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 2nd June, 1885, confirming a decree of Maulvi Ahmad-ullah, Subordinate Judge of Azamgarh, dated the 23rd December, 1884.

Held that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

Per MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court-Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res judicata*.

Also *per* MAHMOOD, J.—The condition in s 13 of the Civil Procedure Code, that the former suit must have been "heard and finally decided", means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhry* v. *Bhagbut Mohaputter* (1), *Shokhee Bewah* v. *Mehdee Mundul* (2), *Dullabh Jogi* v. *Narayan Lakhu* (3), *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (4), *Fateh Singh* v. *Lachmi Kooer* (5), *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (6), and *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (7) referred to.

Also *per* MAHMOOD, J.—The words *ba haisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come in to Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai* v. *Kalka Prasad* (8) dissented from. *Watson* v. *The Collector of Rajshahye* (9) and *Salig Ram* v. *Tirbhawan* (10) referred to.

The facts of this case are stated in the judgment of Mahmood, J.

Mr. *C. H. Hill* and Mr. *Abdul Majid*, for the appellant.

Maulvi *Mehdi Hasan* and Lala *Jokhu Lal*, for the respondents.

MAHMOOD, J.—I accept the argument addressed to us by Mr. *Abdul Majid* on behalf of the appellant, and I would decree this appeal, and, setting aside the decisions of both the lower Courts, remand the case to the Court of first instance for trial on the

(1) 3 W. R., Act X Rul. 140.
(2) 11 W. R., 327.
(3) 4 Bom. H. C. Rep., A. C., 110.
(4) I. L. R., 6 Bom. 482.
(5) 13 B. L. R., Ap. 37.
(6) I. L. R., 7 Calc. 214.
(7) 3 Mad. H. C. Rep. 84.
(8) I. L. R., 5 All. 595
(9) 13 Moo. I. A. 160.
(10) Weekly Notes, 1885, p. 171.

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merits. I will state my reasons for coming to this conclusion. The facts of the case, so far as they are necessary for the disposal of this appeal, are these.

Muhammad Salim, the plaintiff-appellant, purchased the property in suit from Musammat Nabian, under a deed of sale executed on the 4th September, 1871; but being probably unable to secure possession of the property, he brought a suit against the vendor and others, who are included as defendants in this suit. On the 9th November, 1872, that suit was dismissed on the ground of misjoinder, and also because the suit was under-valued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court. In the order of dismissal there is no reference to s. 10 of the Court-Fees Act (VII of 1870). The words used are:—"The claim of the plaintiff in its present form is dismissed with costs;" and I think the learned pleader for the respondent has rightly argued that the order must be taken to have been passed under the section above mentioned. From this order an irregular sort of miscellaneous appeal was preferred by the plaintiff, but the appeal was dismissed on the 12th April, 1873, when that litigation terminated. Matters stood thus until the 9th September, 1881, when the present suit was instituted by the same plaintiff, in respect of the same property, against the same defendants, and practically with the same object as the former suit. The suit has been resisted by the defendants, who, *inter alia*, pleaded that the suit was barred *in limine*, and in support of this plea they relied mainly upon the rule of *res judicata* as enunciated in s. 13 of the Civil Procedure Code. The plea has been accepted by both the lower Courts, and they have concurred in dismissing the suit without going into the merits.

The learned counsel for the appellant contests this view of the law in the argument which he has addressed to us, and he contends that there has been no real adjudication of the rights of the parties, and therefore neither the plea of *res judicata* nor any other plea in bar of the action applies to the case. I accept this contention. It is a fundamental rule of law that where there is a right there is a remedy—*ubi jus ibi remedium*; and the operation of this maxim cannot be defeated, unless the plaintiff has already had his remedy, or

the remedy is barried by some clear and positive rule of law. Here the plaintiff asserts that by his purchase of the 4th September, 1871, he has become the owner of the property for which he sues, and if this assertion is true, he has his *jus*, and is entitled to his remedy, which, of course, cannot be granted without a proper adjudication of the merits of his title. There has clearly been no such adjudication in this case, and indeed the learned pleader for the respondents virtually concedes that the judgments of the lower Courts can be supported only upon the ground of the application of s. 13 of the Civil Procedure Code to this suit, though he has also attempted to rely upon other provisions of the law, and especially upon cl. ii of s. 10 of the Court-Fees Act, and contends that the expression in the Munsif's order that the suit was dismissed "*ba haisiyat manjuda*," that is, in the form in which it was brought, will not prevent the operation of the plea of *res judicata*.

It seems to me that much misapprehension prevails in the Mufassal in regard to pleas which bar an action *in limine*, and I may take this opportunity of expressing my views upon the subject as briefly as I can, especially as they will dispose of the whole argument pressed upon us by the learned pleader for the respondents. The rule that no one ought to be harassed twice, if it be clear to the Court that it is for one and the same cause—*nemo debet bis vexari, si constat curiæ quod sit pro unâ eâdem causâ*—is only a rule of adjective law or procedure which operates as a qualification or limitation of the maxim *ubi jus ibi remedium*, which I have already quoted. The maxim is the basis of the rule of *res judicata*, which was so fully considered in the celebrated case of the *Duchess of Kingston* (1) by Sir William De Grey, C. J., who delivered the unanimous judgment of the learned Judges in that case. The rule explained there has never been materially altered, and I look upon s. 13 of our own Civil Procedure Code as a reproduction of the old rule of law. Now the argument of the learned pleader for the respondents has left the impression upon my mind that he contended that the mere dismissal of a suit will, because it is a decree, operate as *res judicata*. This is not so. Judgments, orders or decrees which operate in bar of the action have been provided for by s. 40 of the Evidence Act (I of 1872), which makes

(1) 2 Smith's L. C., 8th ed., p. 784.

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them relevant and thus admissible in evidence. But that section comprehends a vast class of such proceedings which cannot be confounded with the rule of *res judicata*. For instance, we have in the Civil Procedure Code itself the provisions in ss. 43, 103, 244, 317, 371, 373, which, though barring an action *in limine*, must not be confounded with the rule of *res judicata* as enunciated in s. 13 of the Code. On the other hand, it is not every dismissal, though incorporated in a decree, that will operate in bar of a second action; and illustrations of this are to be found in ss. 99 and 99*A* of the Code itself, which permit a fresh suit in express terms. I have said all this in order to show that it is not every decree or judgment which will operate as *res judicata*, and that every dismissal of a suit does not necessarily bar a fresh action.

Now the question is whether the dismissal of the plaintiff's former suit under s. 10 of the Court-Fees Act can be regarded as *res judicata* barring the present action. The next question is, whether the dismissal of a suit for misjoinder would have any such effect; and lastly, the question is whether the dismissal of the suit "*ba haisiyat maujuda*," that is, in the form in which it was brought, which occurs in the Munsif's order in the former suit dated the 9th November, 1872, has any bearing upon the question. I have enumerated these points because they distinctly arise from the contention of the learned pleader for the respondents, and I will deal with them *seriatim*.

First, then, I have no doubt whatsoever that the dismissal of a suit under cl. ii, s. 10 of the Court-Fees Act can never operate as *res judicata* so as to bar a fresh action, where the plaintiff has valued his claim rightly and has paid adequate court-fees. The section begins by laying down the rule that if a suit has not been properly valued, "the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or net profits been rightly estimated." And then comes cl. ii, with which we are concerned :—"In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." Now what I wish to say in the first place is that the object of these provisions, as indeed of the whole

Act, is to lay down rules for the collection of one form of taxation, and this I regard to be the scope of the enactment, though it contains no preamble at all : and I hold it as a fundamental rule of construction that statutes which impose pecuniary burdens, or encroach, upon the rights of the subject, or qualify those rights must be construed strictly. The rule applies with especial force to such provisions as provide a penalty, whatever it nature may be. These rules which are applied by Courts of Justice in England to Acts of Parliament are too well recognised to require any citation of authorities, and I hold that they are in the main applicable to the interpretation of the enactments of the Indian Legislature. This being so, I am of opinion that the dismissal of a suit under s. 10 of the Court-Fees Act is intended to be simply a penal clause to enforce the collection of the court-fees, and that if such dismissal is sought to operate as a plea barring a fresh action *in limine* as *res judicata*, we must look elsewhere in the statute-book. The learned pleader for the respondent points to s 13 of the Civil Procedure Code in support of his contention. But the rule there laid down expressly renders its application subject to the all-important condition that the former suit " has been *heard* and *finally decided*." Now, it is not necessary for me to enter into an elaborate explanation as to what these words mean, for, as far back as 1865, two learned Judges of the Calcutta High Court, in *Ramnath Roy Chowdhry* v. *Bhagbut Mohaputter* (1), laid down the rule that a former judgment proceeding wholly on technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. Again, another Bench of the same Court, in *Shokhee Bewah* v. *Mehdee Mundul* (2), held that a suit on the same cause of action, and between the same parties as a former suit which was summarily dismissed without being tried on its merits, is not one on a cause of action which " has been heard and determined by a Court of competent jurisdiction in a former suit," and that the latter suit would therefore not be barred. To come closer to the point now before us, we have the judgment of Couch, C. J., in *Dullabh Jogi* v. *Narayan Lakhu* (3), where the suit had been dismissed on the ground of improper valuation, and where it was

(1) 3 W. R., Act, X Rul. 140. (2) 11 W. R., 327.
(3) 4 Bom. H. C. Rep., A. C., 110.

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held that such dismissal would not operate as *res judicata*, barring a subsequent suit. It is true that these rulings were passed before either the present Civil Procedure Code or the Court-Fees Act existed; but I hold that even under the present law they are applicable to cases like the present. Indeed, the judgment of Latham, J., in *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (1), is a very recent authority, and there is much in the *ratio decidendi* there adoped which supports my view, though the exact point with which I am now dealing was not decided. Then as to the question of dismissal of the former suit on the ground of misjoinder or multifariousness, I need only cite *Futeh Singh* v. *Lachmi Kooer* (2), which is an authority for saying that such a dismissal does not operate as *res judicata*. I may also cite *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (3) in support of my view.

It remains for me now only to deal with the third point upon which the argument on behalf of the respondent has proceeded. It is true that in the case of *Ganesh Rai* v. *Kulka Prasad* (4) two learned Judges of this Court held that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again, contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Explanation III*, and therefore as a bar to the fresh suit. The words in the original decree in that case appear to have been the same as here—*i. e.*, the claim was dismissed "*ba haisiyat maujuda*," and no doubt much would depend upon the interpretation of these words. With due deference to the learned Judges who decided that case, I confess I am unable to accept the view of the law there enunciated. The report of the case shows that the former suit had been dismissed on the ground that the plaintiff had not filed his certificate of sale with the plaint, that is to say, for a purely technical irregularity with reference to the rule contained in s. 59 of the Civil Procedure Code. The suit had not been tried upon its merits, and the Munsif took care to qualify his decree by dismissing the suit "*ba haisiyat maujuda*," which cannot, in my opinion, be dealt with as nugatory in interpreting that decree; and if proper effect is given to such words, they can have

(1) I. L. R., 6 Bom. 482.
(2) 13 B. L. R., Ap. 37.
(3) I. L. R., 7 Calc. 214.
(4) I. L. R., 5 All. 595.

only one meaning, namely, that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. Whether such a qualified decree was right or wrong is another matter; but if it was wrong, it might have been a proper subject of complaint on the part of the defendant, against whom the suit was dismissed only as then brought, and he might possibly have taken measures, either by way of review or appeal, to make the decree final in the sense of the dismissal being upon the merits of the claim and not upon technical grounds of form; and if he did not take such measures, the decree must be taken as it stands, unless indeed the circumstances of the case showed that it was in reality a decree dismissing the suit after adjudication of the rights of the parties. But it was not so; and I cannot interpret such a decree as having the force of a final adjudication upon the merits of the issues raised between the parties, so as to operate as *res judicata* when a suit is instituted in proper form and the rights of the parties have to be adjudicated upon. Further, I am not prepared to accept the view upon which the judgment of the learned Judges in the case cited seems to proceed, to the effect that the procedure provided by Chapter XXII of the Civil Procedure Code is the only manner in which a plaintiff can come into court for the second time to ask for adjudication upon the merits of his rights—merits which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. Nor can I hold that *Explanation III* of s. 13, Civil Procedure Code, upon which the learned Judges in that case relied, would have any bearing upon a case such as the present. What really happened in this case was, that the Munsif in dismissing the suit "*ba haisiyat maujuda*"—in the form in which it was brought—adopted a course long known to the Mufassal Courts in this country under the somewhat inaccurate name of "*non-suit*"—a state of things to which the Lords of the Privy Council referred in *Watson* v. *The Collector of Rajshahye* (1), which is the leading case upon the subject, and in which the former suit was dismissed by a decree which reserved to the plaintiff the right to bring a future suit.

(1) 13 Moo. I. A. 160.

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Their Lordships, after stating the law as it then stood, made the following observations with reference to the reservation contained in the former decree :—

"It has been argued that that decree, not having been appealed against by the respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court, in a case in which the former decree had been pleaded as *res judicata*, and which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case."

These observations leave no doubt in my mind that we can in this litigation examine the decree of the 9th November, 1872, in order to satisfy ourselves as to whether that decree can be properly pleaded as *res judicata* barring the present suit. But, as I have already said, that decree disposed of the suit upon the ground of purely technical defects, which in a just juridical sense cannot be regarded as a final adjudication upon the rights of the parties, so as to furnish a basis for application of the plea known in the Roman law under the name of *exceptio rei judicatæ*, which is the foundation of the rule incorporated in s. 13 of our own Civil Procedure Code. And interpreting that section as I do, I adopt the language used by the learned Judges of the Madras High Court in *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar* (1), when I say that to conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Res judicata dicitur quæ finem*

(1) 3 Mad. H C Rep 84.

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controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolutione contingit (Dig. XLII, Tit. I. Sect. I). The case of *Ganesh Rai* v. *Kalka Prasad* (1), already referred to, ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling, and we did so before in a case [*Salig Ram* v. *Tirbhawan* (2)], in which the point for determination was very similar to this case.

For these reasons my order in the case is that this appeal be decreed, that the decrees of both the lower Courts be set aside, and that the case be remanded to the Court of first instance under s. 562, Civil Procedure Code, for trial upon the merits. Costs to abide the result.

OLDFIELD, J.—I concur in the order of remand.

Case remanded.

FULL BENCH.

1886 *May* 3.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* MADHO.

Prosecution, withdrawal from—Government Pleader—Public Prosecutor—Criminal Procedure Code, s. 494.

Held by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

THIS was a reference to the Full Bench. The point of law referred is stated in the order of Brodhurst, J., by whom the reference was made.

BRODHURST, J.—I called for the record of this case on perusal of the Sessions statement of the District of Cawnpore for the month of December, 1885.

(1) I. L. R., 5 All. 595. (2) Weekly Notes, 1885, p. 171.

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Madho Brahman was committed for trial on a charge of murder. After the witnesses for the prosecution had been heard, the Sessions Judge recorded the following note and order :—"The Government Pleader, with the consent of the Court, withdraws from the prosecution, under s. 494, Criminal Procedure Code. Accordingly Madho is acquitted of murder under s. 302, Indian Penal Code." The Government Pleader had apparently been appointed by the Magistrate of the District, under the 2nd paragraph of s. 492 of the Criminal Procedure Code, to be Public Prosecutor merely for the purpose of this case, and as he had not been appointed to be a Public Prosecutor "by the Governor-General in Council or the Local Government," he was not, in my opinion, competent, even with the consent of the Court, to withdraw from the prosecution, and the acquittal of Madho Brahman was, I think, under the circumstances stated, illegal.

There is, however, a passage in a judgment of a Bench of this Court in the case of *Empress* v. *Ramanand* (1), which seems to support the order of the Sessions Judge. The observations referred to were probably made in the absence of any discussion on that particular point, and it may have been supposed that, as in Bengal, so in these Provinces, all Government Pleaders had been appointed to be *ex-officio* Public Prosecutors; but as the judgment has been reported, and as the matter is one of very considerable importance, I refer the case for orders to the Full Bench.

The following opinion was given by the Full Bench :—

STRAIGHT, Offg. C. J, and OLDFIELD, BRODHURST, and TYRRELL, JJ.—We assume, for the purpose of answering this reference, that there was a withdrawal of the case; and we desire only to say that we are satisfied that the person charged with the prosecution had not the power of a Public Prosecutor, with regard to withdrawal, under s. 494 of the Criminal Procedure Code.

(1) Weekly Notes, 1883, p. 199.

CRIMINAL REVISIONAL.

1886
May 4.

Before Mr. Justice Oldfield.

QUEEN-EMPRESS *v.* JANKI PRASAD AND OTHERS.

Act XLV of 1860 (*Penal Code*), *ss.* 99, 353—*Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code, ss.* 2, 251—"*Signed*"—*Right of private defence.*

A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed.

Held that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant.

Held also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence.

THIS was an application for revision of an order of Hakim Muhammad Amjad Ali, Magistrate of the first class, dated the 26th January, 1886, which order had been affirmed by the Sessions Judge of Benares, Mr. C. Donovan, on appeal.

The applicants, Janki and five other persons, were convicted by the Magistrate of an offence under s. 353 of the Indian Penal Code. It appeared that a warrant for the arrest of Janki in execution of a decree had been delivered by the Munsarim of the Court executing the decree to a process-server of the Court called Imam Bakhsh. This warrant was not signed by the Munsarim, but only initialled by him. When Imam Bakhsh proceeded to execute the warrant, he was assaulted by Janki and the other applicants, his friends.

It was contended for the applicants that the arrest was illegal, the warrant not being signed as required by s. 251 of the Civil Procedure Code, and therefore the resistance to the arrest did not constitute an offence under s. 353 of the Indian Penal Code.

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QUEEN-EMPRESS v. JANKI PRASAD.

Mr. *W. M. Colvin*, for the applicants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

OLDFIELD, J.—This is an application for revision of a conviction under s. 353, Indian Penal Code, for assaulting a public servant in executing a warrant of arrest. The warrant was issued for the arrest of a debtor under the provisions of s. 251, Civil Procedure Code. It was signed with the initials of the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution, who was the officer resisted.

It cannot be disputed that the warrant fulfilled the requirements of s. 251, except in one particular, to which exception is taken, namely, that it was signed with the Munsarim's initials and not his full name, and it is contended that the warrant was, in consequence, bad, and the officer could not legally execute it, and consequently there was no offence committed under s. 353.

I cannot allow this contention. S. 251 directs that the warrant shall be signed by the Judge or such officer as the Court appoints in this behalf. S. 2, referring to the word "signed," is to this effect:—"'Signed' includes marked, when the person making the mark is unable to sign his name; it also includes stamped with the name of the person referred to." This paragraph is not very explicit; but assuming it means that the person signing should, if able to write, write his name in full—and certainly it is proper that this should be done in the case of a warrant—I do not hold that because the signature on the warrant is confined to the initials of the name, it was not the duty of the officer to execute it,—and referring to s. 353 of the Penal Code under which the conviction has been made, that is really the question here,—and whether the warrant was such a warrant as it was the duty of the officer receiving it to execute.

I think it was. It was in all other respects in form, and in the particular of the signature it bore what was intended to be the signature of the proper officer, and it bore the seal of the Court, and it was delivered to the proper officer to execute, who received it from the officer authorized to issue the warrant as the warrant of the Court, and I think it became the duty of the officer to whom

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it was delivered to execute it. He would in fact have failed in his duty in not executing it; and any resistance to him will be resistance to a public servant in the execution of his duty as such. The officer was acting under s. 353 of the Indian Penal Code, in good faith, under colour of his office. I may notice as bearing on the question that the act of the accused does not cease to be an offence on the ground that the act was done in the exercise of the right of private defence, as there is no such right under s. 99, Indian Penal Code, against an act done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. Looking to the facts of the case, I am of opinion that the option of a fine may be given, and I alter the sentence in each case to a fine of Rs. 10, or rigorous imprisonment for one month.

Conviction affirmed.

APPELLATE CIVIL.

1886 *May 4.*

Before Mr. Justice Straight, Offg Chief Justice, and Mr. Justice Tyrrell.

NURA BIBI (PLAINTIFF) *v.* JAGAT NARAIN AND OTHERS (DEFENDANTS)*

Mortgage—Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882 (*Transfer of Property Act*), *ss.* 95, 100—*Limitation—Act XV of* 1877 (*Limitation Act*), *sch* ii, *Nos.* 134, 148—*Burden of proof.*

K and *J* jointly mortgaged 36 sahams or shares of an estate to *C*, giving him possession. *C* transferred his rights as mortgagee to *T* and *M*. In execution of a decree for money against *K* held by *M*, *K's* rights and interests in the mortgaged property were sold, and were purchased by *P*, whose heirs paid the entire mortgage-debt. *R*, an heir of *J*, sued the heirs of *P*, to recover from them possession of *J's* sahams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P*. The plaintiff alleged that the mortgage to *C* had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since *C* transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sahams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point.

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* Second Appeal No 1098 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th June, 1885, reversing a decree of Rai Pandit Indar Narain, Munsif of Allahabad, dated the 2nd January, 1885.

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Held, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

Held, therefore, that No. 148 and not No 134 of sch ii of the Limitation Act was applicable to the suit.

Umrunissa v. *Muhammad Yar Khan* (1) distinguished *Pancham Singh* v. *Ali Ahmad* (2) referred to.

Held also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram* v. *Narendar Bahadoor Singh* (3) referred to.

THE facts of this case were as follows:—Two Muhammadan ladies, named Khuban Bibi and Jan Bibi, owned respectively 31 sahams or shares and 5 sahams or shares of a certain estate. They jointly mortgaged the 36 shares to one Chitu, giving him possession. Chitu transferred his rights as mortgagee to persons called Teja Bibi and Makhdum Bakhsh. Makhdum Bakhsh held a decree for money against Khuban Bibi, and he caused her rights and interests in the property to be put up for sale in execution of that decree, and the same were purchased by one Panna Lal, whose heirs paid the mortgage-debt. The plaintiff in this case was the heir of Ramzan, one of the heirs of Jan Bibi. She claimed to recover from the heirs of Panna Lal possession of Jan Bibi's 5 sahams, on payment of a proportionate amount of the mortgage-money paid by Panna Lal.

The plaintiff alleged that the mortgage to Chitu had been made forty years before suit.

The defendants set up as a defence that a much longer period than forty years had expired since the date of the mortgage; that

(1) I. L. R., 3 All. 24. (2) I. L. R., 4. All. 58.
(3) L. R., 3. Ind. Ap 85.

forty-one years had passed since Chitu had transferred his right as mortgagee ; that they had redeemed the mortgage 21 years ago, and had been since its redemption in proprietary and adverse possession of the shares in suit ; and that the suit was barred by limitation.

The Court of first instance (Munsif of Allahabad) gave the plaintiff a decree, applying No. 148, sch. ii of the Limitation Act, and holding as follows on the question of limitation :—

"The plea of limitation which has been set up is, in the opinion of the Court, untenable. To render a claim barred by limitation it is necessary that full sixty years should elapse after the expiry of the term of the mortgage. The defendants do not know when the mortgage was originally made to Chitu. The plaintiff also is unaware of this. The burden of proving that sixty years have elapsed, however, rests with the defendants ; but they have failed to adduce any proof and therefore the plea set up by them fails. The burden of proof is thrown on the defendants for two reasons—(i) because they affirm a fact which the plaintiff denies, and (ii) because the burden of proof rests with the party which would be the loser if no evidence were given by either party. The law takes great care that mortgaged property should not pass from the hands of the original owners to the hands of strangers. The defendants try to create their proprietary title in the property, and therefore the burden of proof should be thrown on them."

The defendants appealed, contending that the suit was governed by No. 134, and not No. 148, of the Limitation Act ; and that the burden of proof as to limitation was on the plaintiff, and not on them.

The lower appellate Court (District Judge of Allahabad) held on these points as follows :—

"With regard to the first of these two contentions, the appellants seek to show that art. 148 applies only to an original mortgagee, and not to others to whom a mortgage has been transferred, and that as the defendants-appellants, if not, as they assert, proprietors, must be held to have purchased the mortgage from the

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mortgagees, the case comes under art. 134 and is governed by the twelve years' period of limitation. No authority has been cited in support of this contention, and I am unable to see that the plaintiff-respondent is other than the owner of an equity of redemption, suing a mortgagee to redeem or recover possession of immovable property, or that the circumstances, as stated above, deprive the plaintiff-respondent of the longer period of limitation prescribed by art. 148.

"But on the second point I hold the lower Court's finding to have been mistaken. The *onus* lies on the plaintiff, and not on the defendants-appellants. I quite concur in the finding that the defendants cannot be said to have had proprietary possession. They purchased the equity of redemption of Khuban's shares only, not of those of Jan Bibi's; and the fact that the mortgage was executed jointly by Khuban and Jan, and that the appellants paid off the whole, does not seem to give them any better position than that of mortgagees in respect of Jan Bibi's shares. They acquired in those shares the right of the mortgagee and nothing more.

"But it is clearly the duty of the plaintiff to prove that the suit has been instituted within sixty years of the time when the right to redeem accrued. Her suit is possible only under art. 148, and she has therefore come into court on the averment implied in its conditions: neither the fact that the averment is challenged by the defendants, or that they admit a mortgage, seems to me to shift the burden on to them.

"The point was not made the subject of a clear issue by the lower Court, though considered in its decision and presumably argued before it. The plaintiff-respondent's pleader has been offered, and has declined, further opportunity of adducing proof. It is apparent that the plaintiff-respondent is in fact unable to give such proof. She stated in her plaint that the original mortgage took place forty years ago, but the defendants-appellants have proved that forty-one years have elapsed since the transfer by Chitu, the original mortgagee, to Teja Bibi and Makhdum Bakhsh.

"Under these circumstances, I am of opinion that the plaintiff-respondent's suit must fail."

The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STRAIGHT, Offg. C.J., and TYRRELL, J.—We think the lower Courts were right in holding that the period of limitation applicable to a suit of this nature is that provided by art. 148 of Act XV of 1877. It was so decided by Pontifex, J., in an unreported Calcutta case mentioned on page 162 of Mr. Mittra's excellent work on Limitation; and our only difficulty is a Full Bench ruling of this Court in *Umrunnissa* v. *Muhammad Yar Khan* (1), which at first sight appears to be at variance with this view. Upon examination, however, it will be seen that the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit. It was held that there had not; but beyond this the decision did not and could not go, and the point now before us may therefore be regarded as *res integra*. In the ruling of Pontifex, J., above adverted to, that learned Judge speaks of the co-mortgagor who redeems the entire mortgage as "standing in the shoes of the mortgagee" in respect of such portion of the redeemed property as belongs to the other mortgagor, and this Bench decided much to the same effect in *Pancham Singh* v. *Ali Ahmad* (2). The equitable principle recognised in these rulings is now embodied in s. 95 of the Transfer of Property Act, which declares that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses properly incurred in so redeeming and obtaining possession." What that charge carries with it is explained in s. 100 of the same statute, which says that, where "by operation of law the immoveable property of one person is made security for the payment of money to another, all the provisions hereinbefore contained as to a mortgagor shall, as far as may be, apply to the owner of such property, and the provisions of ss. 81 and 82 and all

(1) I. L. R., 3 All. 24. (2) I. L. R., 4 All. 58.

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the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge." We only refer to these provisions, which cannot govern the mortgage in the present case, which was long antecedent to the Transfer of Property Act, by way of analogy ; but applying the equitable principle that they adopt, the effect is the same, namely, that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor and in its entirety, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose will be in the nature of a suit for redemption. Such a suit naturally falls within the definition of art. 148 of Act XV of 1877, and we fail to appreciate how it is possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin of such possession was conceded by him, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit.—*Kishan Dutt Ram* v. *Narendar Bahadoor Singh* (1). We assume that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, and under these circumstances very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. But she produced none ; and though offered an opportunity to bring forward further evidence, her pleader declined to do so. Under these circumstances, we think the learned Judge below was right, and the appeal is dismissed with costs.

Appeal dismissed.

(3) L. R., 3 Ind Ap. 85.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr Justice Tyrrell.

1886
May 5.

PARAGA KUAR (JUDGMENT-DEBTOR) *v.* BHAGWAN DIN AND ANOTHER (DECREE HOLDERS.)*

Execution of decree—Civil Procedure Code, s. 230—*Meaning of "granted."*

Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, *i e*, an application for execution should not be granted if a previous application has been allowed under the provisions of that section.

The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249.

In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March, 1884, the decree-holder applied once more for execution of the decree.

Held that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed.

THE facts of this case are sufficiently stated in the judgment of Straight, Offg. C. J.

Mr. *W. M. Colvin* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Bishambar Nath* and Munshi *Kashi Prasad*, for the respondents.

* First Appeal No. 122 of 1885, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 4th July, 1885.

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PARAGA KUAR v. BHAGWAN DIN.

STRAIGHT, Offg. C. J.—On the 26th August, 1865, one Bhagwan Din, the respondent before us, obtained a decree against a person named Hattu Singh. It was an instalment decree for Rs. 3,214-14-2, payable by yearly instalments, commencing in the year 1866, and extending to the year 1882, in all a period of 16 years. In the year 1870 the judgment-debtor Hattu Singh died leaving behind him a widow named Manni Kuar and two daughters, one of whom had a son named Jai Johdan Singh. He also left among his heirs a nephew named Zalim Singh, whose widow, named Paraga Kuar, is the appellant before us.

Now down to March, 1877, various amounts had been paid on account of the decree, and on the 6th March of that year, an application for execution was made against Manni Kuar, the widow of the deceased Hattu Singh. The result of these proceedings was, that an arrangment was come to on the 11th May, 1877, for liquidation of the amount then due, and this arrangement was confirmed by the Court on the 9th June, 1877. The next application for execution, with which we have to do, was made on the 9th March, 1881. At this time the decree was more than 12 years old. There was an office report made to the effect that Manni Kuar had died, and therefore notice was issued to Jai Jodhan Singh and Paraga Kuar, widow of Zalim Singh above-named, surviving heirs of the judgment-debtor. On the 6th April, 1881, it was notified to the Court that another arrangement had been effected under which a certain sum had been paid by Jai Jodhan Singh in satisfaction and discharge of the claim against him, and that the balance of Rs. 800 had been agreed to be paid by Paraga Kuar by yearly instalments. On the 5th March, 1883, there was another application for execution against Paraga Kuar, which was the last preceding application for execution to that which we have to deal with, namely, that of the 31st March, 1884, and what is prayed by the decree-holder is, that the execution of the decree of 1865 should be allowed by attachment and sale of the property of Paraga Kuar.

That application has been granted by the lower Court, and Paraga Kuar prefers this appeal. The only real ground on which we are asked to disturb its order is, that the original decree having

been more than 12 years old at the date of the two last applications for execution, it is barred by limitation. Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is 12 years old, there is a prohibition against its being executed more than once, that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section.

Now the test to apply to this case is, to see whether the last of those applications preceding the application the granting of which is the subject of appeal, was *granted*, because, if granted, the prohibition referred to in the section applies. The last preceding application was that of the 5th March, 1883, and all that seems to have been done was, that application was made, notice to appear was issued, and after this notice, a petition was put in intimating that some arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. It appears to me impossible to say that the mere filing of a petition with the result that the application contained in it is subsequently struck off, is granting an application within the meaning of s. 230 of the Code; and looking to the provisions contained in ss. 245, 248 and 249, it also appears to me that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In other words, it is one thing to ask for execution of a decree, and another to have such application granted. I therefore think the last preceding application here was not one that can be said to have been "granted." The same may be said as to the application of the 9th March, 1881; nothing more was done as to that than as to the application of the 5th March, 1883. Therefore that also is not within the prohibition contained in s. 230.

Under these circumstances the decree, though twelve years old and upwards, is not barred by s. 230 of the Civil Procedure Code, and therefore the plea of limitation fails on that ground.

It has been suggested that the Judge has not tried the question whether Paraga Kuar was a party to the compromise of 1881;

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PARAGA KUAR v. BHAGWAN DIN.

but no such objection has been put forward by her in her grounds of appeal. Her plea was that the execution of the decree was barred by limitation, and, though this matter has been before this Court in another shape in appeal from the District Judge, and is again before us, no such allegation has ever been formally made on her part, nor has it been entered in the memorandum of appeal. Under these circumstances we should not be justified in interfering with the order of the lower Court or delaying the execution of the decree. The appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

1886 *May* 8

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* DHUNDI.

Attempt to cheat—Act XLV of 1860 (*Penal Code*), *ss* 417, 511.

In a prosecution for an attempt to cheat, under ss 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas* and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed.

Held that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside.

THIS case was reported to the High Court for orders by Mr W. Young, Sessions Judge of Agra. The facts were set forth in the Judge's reference as follows :—" The applicant for revision, Dhundi, Ahir, is a servant of Kallu Mal, Bania, of Mathura, and the case against him is that he, at the central octroi office in Mathura, on the 16th December, 1885, falsely represented three *kuppas* (skins), which were there and then produced, to contain ghi,

whereas only two contained ghi and the third contained oil, and that the object of this false representation was to obtain a certificate entitling him to a refund of octroi duty on three *kuppas* of ghi, which would have amounted to 30 annas, instead of the proper refund, which would have been 25 annas only. The prosecution alleges that, prior to granting the refund certificate, the octroi officers took the precaution of examining the contents of the three *kuppas*, and found that, in fact, two only contained ghi and the third oil. Whereupon Dhundi was charged with attempt to cheat, and was tried on that charge, and finally was convicted and sentenced to pay a fine of Rs. 4, or, in default, to suffer one month's rigorous imprisonment. Dhundi denies the facts, and says that he never alleged the three *kuppas* to contain ghi, and I notice that the prosecution produce no invoice in his master's writing, detailing the *kuppas* as three *kuppas* of ghi. This is a considerable defect in the proof, for it is usual to send such invoices when goods are presented for refund of octroi. I notice also that accused alleges enmity between the octroi superintendent and his (accused's) master. However, I should not refer this case if it had been solely the facts which were doubtful. I think that even supposing the fact to have been that the accused misrepresented the contents of the *kuppas* as he is said to have done, he yet had not completed an attempt to cheat, but only had made preparation for cheating. The procedure in case of a refund of octroi at Mathura is, that the central office, on satisfying itself that the articles produced are what they are said to be, grants a certificate, which certificate is indorsed by the outpost clerk when he passes the goods (on which refund is claimed) out of the town. The owner takes back the certificate so indorsed to the central office, and here these certificates are encashed once a week, *viz.*, on Saturdays. Now, even supposing that Dhundi by false representations had succeeded in getting a refund certificate for 30 annas, yet he still had a *locus pœnitentiæ*. He had to get it indorsed at the outpost, and had to present it on the following Saturday for encashment before he finally lost all control over it, and could no longer prevent the completion of the offence. Before that time (*i. e.*, the time of presentation on a Saturday), he might have altered his mind even from prudence, if not from penitence, and torn up the certificate,

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and no cheating could then have happened. The definition of cheating is so comprehensive that I must add a sentence or two with reference to the argument that the mere inducing the clerk to do a thing (*viz.*, to give the certificate), which he would not have done unless so deceived, would amount to cheating. It is to be noted that the act or omission must be one that causes, or is likely to cause, damage to such person, damage or loss, &c. But here the mere certificate by itself and until indorsed, and until further action had been taken upon it, could not possibly have caused loss or damage to any person. And further, as a matter of fact, no such certificate was delivered to Dhundi. For these reasons, I think the decision below wrong in law, and would recommend its reversal."

BRODHURST, J.—For the reasons stated by the Sessions Judge, I annul the Deputy Magistrate's finding and sentence of the 29th February, 1886, and direct that the fine, if realized, be refunded.

Conviction set aside.

1885
November 11.

APPELLATE CRIMINAL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v* RAM SARAN AND OTHERS.

Accomplice—Evidence—Corroboration—Act I of 1872 (*Evidence Act*), *ss.* 114 (*b*), 133.

The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*; but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R* v. *Webb* (1), *R* v. *Dyke* (2), *R.* v. *Addis* (3), and *R.* v. *Wilkes* (4), referred to.

(1) 6 C. and P 595 (3) 6 C and P. 338.
(2) 8 C. and P. 261. (4) 7 C. and P. 272.

The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

In the trial of *R*, *S*, and *M*, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P*, who was jointly tried with them for the same offence, (ii) the evidence of an accomplice, (iii) the evidence of witnesses who deposed to the discovery in *R's* house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found.

Held that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P*.

THE appellants in this case, Ram Saran, Piru, Mohib Ali, and Ram Ghulam were convicted by Mr. G. J. Nicholls, Sessions Judge of Ghazipur, of the murder of a boy called Gur Prasad, and were sentenced to death, the order of the Sessions Judge being dated the 18th August, 1885. The facts of the case, so far as they are material for the purposes of this report, are stated in the judgment of Straight, J.

The appellants were not represented.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

STRAIGHT, J.—In this case four persons—Ram Saran, Piru, Mohib Ali, and Ram Ghulam—have been convicted by the Sessions Judge of Ghazipur of the murder of a boy named Gur Prasad, son of Damri, *Bania*, on the 16th June, 1885. All the convicts have appealed, and the case has also come in the ordinary course before us for confirmation of the sentences of death which have been passed on the appellants The case is one which has caused my brother Tyrrell and myself great anxiety, and has occupied much of our time, and looking to the care with which the Judge tried it, and to the circumstance that the assessors concurred with him in his verdict, we have hesitated long before arriving at the conclusion, as regards some of the appellants, that the convictions cannot be sustained.

The circumstances of the case are shortly these. On Tuesday, the 16th June, the deceased boy, Gur Prasad, was staying with his sister at Sikandarpur, and on that day he left her house, and

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neither by her eyes nor by the eyes of any other of his relatives was he ever again seen alive. At the time he left, he was wearing certain articles of jewellery, and his sister's attention having been aroused at about noon by his non-appearance, she inqured after him, but in consequence of his father being absent at the time, no serious steps were taken to bring his disappearance to the notice of the authorities. It was not until Thursday, the 18th, that complaint was made to the police, when at the instance of the sister, they were informed that the boy was missing, and that no trace of him could be found. On the same day, Piru, one of the accused, was sent for, but he does not appear to have given any information at that time. He was warned that he had better give information or he would be sent before the Magistrate, and was then allowed to go to his home. On the 19th he was again sent for, but no serious information was then obtained from him; but on the 20th, having been again brought to the thanah, and in consequence of information then given by him, the police went to the house of the accused Ram Ghulam. There, according to the evidence of two witnesses for the prosecution, after some hesitation, Ram Gulam produced from a hole in the corner of his room certain of the articles of jewellery which the boy was wearing when he left his sister's house on the 16th June, and which must have been taken from his body. So that, as regards Ram Ghulam we have this evidence, that upon information given by Piru, the police went to his house which was searched, and that he there dug up these ornaments. Following on Piru's statement regarding the ornaments, the house in which he himself lived was examined, and under the earthen floor a grave was discovered, and therein undoubtedly was found the body of the unfortunate lad Gur Prasad. At this stage it appears that Ram Ghulam and Piru were taken into custody, and so remained during all the subsequent proceedings.

Now it seems that all the four appellants, together with one Sukhai, *Teli*, were intimate friends and acquaintances; that with the exception of Ram Saran they all belonged to a disreputable class known as "Mokhs"; and that they were in the habit of dancing and frequenting public places together. On the 30th June Sukhai made a long statement to the Deputy Magistrate, not the Magistrate who was subsequently engaged in the inquiry—

by which he implicated not only himself and Piru, but also Ram Ghulam, Ram Saran and Mohib Ali, the other appellants, already mentioned as having been concerned in the boy's murder. On the 1st July, Piru also made a statement bearing a singularly close resemblance to that made by Sukhai, and for the purpose of this judgment, it may be at once remarked here that the two accounts circumstantially coincide in representing that Sukhai and Piru and the other three appellants were engaged in the murder of Gur Prasad on the night of Tuesday, the 16th June. In addition to these materials for arriving at a conclusion in the matter, there is also the evidence of two men, one Ishri, *Mali*, and the other Rang Lal, to the effect that Rang Lal, about noon on the 16th, saw Piru, Sukhai, and Mohib Ali, with the boy at Sukhai's door, and that Ishri, on the evening of the 16th instant, before sun set, saw the four prisoners, with Sukhai, sitting in Shamshera's *dalan, i.e.*, near the place where the body was afterwards found. Now these circumstances, so far as my memory serves me, exhaust the matters proved on behalf of the prosecution, and upon these materials the Judge has convicted all the four appellants. I may, in passing, observe that Piru, who pleaded guilty in the Sessions Court, was nevertheless tried jointly with the other accused, and therefore his confession made before the Deputy Magistrate on the 1st July, and subsequently repeated before the Judge, might be taken into consideration as against the other prisoners.

With regard to Piru, his case may be dismissed at once. The Judge, upon the materials before him, very properly convicted Piru of murder; and that he took part in the commission of the crime there cannot be a moment's doubt. While the evidence as to the cause of death is not strictly proved as regards the other accused, Piru's own admission as to the mode in which death was caused is clear against himself, so that he cannot take advantage of the fact that there is no scientific proof of the cause of death. With regard to the other three appellants the matter stands thus. As to Ram Ghulam, the case for the prosecution is supported by the confession of Piru, by the evidence of Sukhai, who received a pardon and was called as a witness, by the circumstance that on the 20th June, some ornaments belonging to Gur Prasad were

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discovered at his house, and by the evidence of one of the two witnesses to whom I have referred, who says that he saw Ram Ghulam with the other prisoners on the evening of the 16th instant before sunset. That is the whole of the case against him; and, with the exception of the digging up the ornaments, it is the same against Ram Saran and Mohib Ali; and it raises crisply and clearly the question as to whether, upon the materials which I have described, we can sustain the convictions and direct that the capital sentences be carried out.

Now I cannot help saying that there is a great deal of loose talk in Courts of Justice regarding the precise position of an accomplice witness, and the legal effect of a conviction based upon such a witness's evidence. The law in this country, as expressed in ss. 133 and 114 of the Evidence Act, is in no respect different from the law of England. It simply reproduces a rule of practice which the English Courts have recognized, time out of mind, and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this. A conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*. But experience teaches that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated; and, when trying a case with a jury, to warn a jury that such a course is unsafe. Further, not only is it necessary that the evidence should be corroborated in material particulars, but the corroboration must extend to the identity of the accused person; and in this connection I may refer to the case of *R.* v. *Webb* (1), in which Williams, J., said:—"You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for at least knowing how the felony was committed. It has been always

(1) 6 C. and P. 595.

my opinion that confirmation of this kind is of no use whatsoever." Then again, in the well-known case of *R.* v. *Dyke* (1), Gurney, B, said :—Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice unconfirmed with respect to the party accused." So in the case of *R.* v. *Addis* (2), Paterson, J., expressed a similar view. Again the *dicta* of Lord Abinger have frequently been referred to in cases of this kind, and are cited in Taylor's work on Evidence as crisply and fully representing the latest principles which the Courts in England have applied in dealing with this question. Upon the opening of the case he said :—" I am clearly and decidedly of opinion, and always have been, and always shall be, that there must be a corroboration as to the particular prisoner :" and when he came to sum up the case to the jury, he said :—" I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused." He then goes on to make a remark which is most thoroughly applicable to cases of the kind which occur in this country :—" A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly ; that he had described how the person did put the knife to the throat, and did steal the property ; it would not at all tend to show that the

(1) 8 C. and P. 261. (2) 6 C. and P. 388.

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party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there, and he left when they were shutting up the house. It is perfectly natural that he should have been there, and have left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him: all the rest depends on the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The same view was expressed in *R.* v. *Wilkes* (1) by Alderson, B., and in many other rulings.

So that, as I understand the rule, there must be some corroboration independent of the accomplice, or, as in the present case, of the accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. I may add that it is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated. Again, the accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration.

These principles seem to me to be embodied in the Evidence Act in force in this country, and in applying them to the case before us, the question is—what is the corroboration here, and is there any independent evidence corroborating the statements of Piru and Sukhai in such a manner as to prove satisfactorily that

(1) 7 C. and P. 272.

the other three appellants were actually engaged in the murder of Gur Prasad?

First with reference to Ram Ghulam there is the evidence of Ishri, *Mali*, and of him alone, who says that in the evening, about an hour before sunset on the 16th June, he saw the four prisoners in Shamshera's *dalan*. If that is corroboration of the kind that is necessary, it does corroborate the statements of Piru and Sukhai, both of whom say that shortly before sunset the prisoners were sitting with the boy Gur Prasad in Shamshera's *dalan*. But is it sufficient corroboration? It is conceded that the prisoners were in the habit of going about together. There is nothing remarkable in this; it was an occurrence which might have been observed any day: and I may remark that it renders the witness's evidence liable to some suspicion; for if the prisoners were so continually together, why should he have noticed their being together upon this particular occasion?

The only other circumstance affecting Ram Ghulam, is that he produced the jewels from the corner of his house on the afternoon of Saturday the 20th June. I have given much anxious consideration and reflection to the question whether this can be regarded as corroboration showing that Ram Ghulam participated in the murder. It would no doubt be corroboration of the evidence of an accomplice that the prisoner participated in a robbery, or that he has dishonestly received stolen property, but, in my opinion, it can be carried no further. It is quite within the bounds of possibility that a murderer might hand the proceeds of his crime to a person who might be found in possession of them and be in guilty possession of them to the extent of knowing they were stolen; but it requires a very long and dangerous leap to arrive at the conclusion that the possession of the property taken from a murdered person is adequate corroboration of the evidence of an accomplice, charging such person in possession with participation in a murder. Under these circumstances, I have come to the conclusion, though not without much doubt and hesitation, that there is no proper corroboration of the statements of the accomplice, Sukhai, or of the co-confessing prisoner, Piru, sufficient to satisfy the requirements of the law, and that for this reason the appeal of Ram Ghulam must be allowed and he must stand acquitted.

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It follows as a necessary consequence that, if the case for the prosecution as against Ram Ghulam fails, it must fail as against the other two accused, Ram Saran and Mohib Ali; for neither of them was found in possession of any property whatever belonging to Gur Prasad, and there is no other evidence. I have only a few words to add as to the remarks made by the learned Judge, towards the close of his judgment, in regard to the materials upon which he bases his conclusions. He says :—"These narratives are corroborated by the finding of the corpse buried in Piru's house"—which is undoubtedly strong evidence against Piru,—"by the finding of the ornaments hidden on the premises of Ram Ghulam"—upon this point I need not repeat the observations I have already made—"by the evidence of Rang Lal and of Ishri, *Mali*,"—as to which again I need not repeat what I have said—"by the association of all five, or of all but Sukhai, in the lease of the grove from Misri Lal, a grove which adjoins that of Damri Lal, where the boy had gone for mangoes,"—a fact of very little value—"by the neglect of Shamshera, brother of Piru, a town chaukidar, to give his message about the boy's being missed"—a matter the importance of which, or how it affects the prisoners, I am unable to see,—"by the association in depravity of all four (Ram Saran being excepted), by Ram Saran's close intimacy with Ram Ghulam, and by the propinquity of the dwellings of Sukhai, Mohib Ali, and Piru, and of Damri Lal, and by the bad character of all five men." Now, here I must observe that the learned Judge appears to me to have been over-pressed by certain matters which ought not to have influenced his mind at all. He had nothing to do with the bad characters of the prisoners. Their characters were absolutely irrelevant to the case. If they or any of them had previously been convicted of any crime, such as was relevant to the particular matter now charged, such, for instance, as robbery, dacoity, or any similar offence, such conviction might have been proved in a formal and proper manner and would then have been relevant. But the bad characters of the accused were not relevant, and the Judge appears to have allowed his mind to be influenced by matters which were calculated to mislead him, and to cause his mind to place a colouring upon the facts, which did not assist him in forming a calm and dispassionate judgment on the case.

Before concluding, I must remark, that according to the statements of Sukhai and Piru, the jewels were given on the night of the murder to one Durga Tewari. It is not clear from the statements of Piru whether Durga was aware of the manner in which the jewels had been obtained ; but, if Sukhai be believed, Durga was not aware of it, and did not know that the ornaments were the proceeds of a murder. It is remarkable that Durga Tewari was never placed in the witness-box to state what actually happened, and whether the jewels were in fact handed to him as stated. This evidence would have been important; because I am not sure that if the jewels had been handed to him in the presence of all the prisoners, immediately after the murder and near the scene of it, there would not have been corroboration of the statements of those two persons. My brother Tyrrell and I have most anxiously considered this case. We may of course have our suspicions as to the correctness of the conclusions arrived at by the Judge and the assessors ; but our decisions in criminal cases, and especially in so grave a matter as a capital offence, must not depend on mere suspicion but must be regulated by the principles of law laid down for the guidance of Courts of Justice. We have no alternative but to allow the appeals of Ram Saran, Mohib Ali, and Ram Ghulam, and direct that they stand acquitted. With regard to Piru, his appeal is dismissed, and we direct that the capital sentence be carried into execution.

TYRRELL, J.—I fully concur in what has fallen from my brother Straight and in the orders he proposes.

PRIVY COUNCIL.

P. C.*
1886
February 17.

BALWANT SINGH (APPELLANT) *v.* DAULAT SINGH (RESPONDENT).

[On Appeal from the High Court, North-Western Provinces.]

Civil Procedure Code, s. 549.

An appeal, although it may have been rejected by the appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.

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* Present: LORD BLACKBURN, LORD MOORE, LORD HOBHOUSE, SIR R. COUCH.

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The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.

APPEAL by special leave from an order (29th November, 1882) of the High Court, refusing to restore to the file an appeal rejected (14th August, 1882) for default in furnishing security for costs demanded by its previous order (26th June, 1882).

The present appellant, as the son of the deceased elder brother of Jagendra Balli, deceased, late Raja of Sikri, obtained a decree, (21st November, 1881) in the Court of the Deputy Commissioner of Jalaun against the respondent, the late Raja's younger and surviving brother, for possession of the raj estates. This decree was reversed by the Commissioner of Jhansi on the 28th February 1882, and against it an appeal to the High Court was filed on the 5th May following. On the 3rd June, the respondent obtained an order under s. 541 of the Code of Civil Procedure, calling on the appellant to show cause why security to the amount of Rs. 2,500 should not be given by him for costs of the appeal. On this the appellant did not appear, and the High Court, on the 26th June, made the order that the appellant should deposit security within six weeks. On the 5th August, three days before the six weeks expired, appellant showed cause why he should not be ordered to give security. This, however, had no effect to prevent the High Court, on the 14th August, striking the appeal off the file with costs, on the ground that this was "of necessity," as the security had not been filed within the time prescribed.

On the 9th September following the appellant presented a petition for the restoration of the appeal, alleging that the order of the 3rd June had not at any time been served upon him, and offering security to the amount fixed in the order of the 3rd June. On this notice to the respondent to show cause was issued, and cause being shown on the 29th November, 1882, the petition of restoration was rejected by an order of that date, of which the terms are set forth in their Lordships' judgment.

The appellant on the 28th January, 1883, applied to the High Court for permission to appeal to Her Majesty in Council; and

notice to the opposite party having been issued, under section 600 of the Code of Civil Procedure, the certificate of leave to appeal was refused.

On the 12th December, 1883, on the appellant's petition setting forth the above facts as grounds, on which petition Mr. *W. A. Raikes* appeared for the petitioner, special leave to appeal was granted by the Judicial Committee.

On this appeal, Mr. *R. V. Doyne* and Mr. *W. A. Raikes*, for the appellant. Whether the order of the 26th June, 1882, was rightly made or not, that of the 14th August was clearly made without due regard to the appellant's not having had an opportunity to show cause, a fact which appeared on his petition of the 5th August. The order of the 29th November, 1882, was wrong for the same reason; and the tender of security should have been held sufficient to secure to the appellant the appeal to which he was entitled.

Mr. *T. H. Cowie*, Q. C, and Mr. *C. W. Arathoon*, for the respondent. The High Court rightly exercised its discretion to refuse to re-admit an appeal, rejected strictly within the terms of s. 549.

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—This come before their Lordships in rather a peculiar way, and there is some difficulty in saying what in substance is the proper course to be taken. It appears that the appellant is seeking to recover property in the possession of the respondent, and that being defeated before the Commissioner of Jhansi, he appealed to the High Court. The respondent applied that the appellant might give security for costs, and on the 3rd June, 1882, the High Court made an order directing the appellant to show cause why the respondent's petition should not be granted. That order to show cause was not properly served upon the appellant, and on the 26th June, the appellant, then, as it would seem, knowing nothing about the order, a further order was made by the High Court in these terms:—"Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs. 2,500 within six weeks from this date" viz., by the 8th August. On the 5th August the appellant presented a petition showing cause why he should not be ordered to give security, and

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on the 14th August another order was made by the High Court. It is simply in these terms :—"Security has not been filed within the time prescribed by the Court. The appeal is therefore of necessity struck off the file with costs." Whether the Court considered the merits of the cause then for the first time shown by the appellant, does not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th of September the appellant presented a petition in which he stated the non-service of the original order to show cause of the 3rd June, and his ignorance of it until he got information in time to file his petition on the 5th August; and he prayed for the restoration of the appeal. It would seem that, on that petition, an order was made dated 13th September, 1882; but their Lordships cannot tell certainly upon what proceedings that order was made, nor can they do more than guess at the terms of it, for by some omission which is entirely unexplained, that order has not been transmitted to this country. The direction given by Her Majesty on the petition for leave to appeal was that the High Court should transmit the prior orders and also all subsequent orders relating to the refusal to restore the appeal, but for some reason or other this order has not been transmitted. The nature of it can only be gathered from a subsequent order which was made in this way. On the 27th November, 1882, the appellant again petitioned the High Court, and in that petition he states that "in obedience to the order of the Court, dated 13th September, 1882, the petitioner submits herewith two security-bonds for Rs. 2,500, as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file." Therefore it would seem that by the order of the 13th September, the Court had held that the appellant must give security, and had allowed time for the purpose. On the 27th November he tenders the security and asks that the proper order may be made for the restoration of the appeal. Upon that there comes an order of the 29th November, which their Lordships have great difficulty in understanding. It is a very short one. It does not say on what petition or proceedings it was made except that it was on a petition of the appellant. It does not state who appeared upon it. The whole of the order is this :—"The petitioner's appeal was

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not dismissed under ss. 556 or 557 of the Civil Procedure Code. This petition therefore is not entertainable under s. 558 of that Code, and it is inapplicable to an order made, as ours was made, under s. 549 of the Code." It is extremely difficult to apply the terms of this order to the petition of the 27th November, and is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is first, whether the appellant should give security; and their Lordships assume that on the 13th September he was ordered to give security after hearing him; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th November, which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the appellant may give security for the costs mentioned in the order of the 3rd June, 1882, of such nature as shall be satisfactory to the High Court and within such reasonable time as shall be fixed by that Court; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

Solicitors for the respondent: Mr. *T. L. Wilson*.

APPELLATE CIVIL.

1886 *March 22.*

Before Sir Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

LAKHMI CHAND (PLAINTIFF) *v.* GATTO BAI (DEFENDANT)*

Adoption—Hindu Law—Jains—Second adoption by widow.

In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and

* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Samilu-lah-Khan, Subordinate Judge of Aligarh dated the 27th June, 1884.

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that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff, and without leaving widow or child.

Held that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband.

Held therefore that the adoption of the plaintiff was valid and effective.

Held that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai* v. *Dakho* (1) referred to.

THE parties to this suit were Jains (Saraogis). The plaintiff sued the defendant for a declaration that he was adopted in January, 1856, by the defendant to her deceased husband Kishen Lal, (who died in September, 1843,) and that as such adopted son he was entitled to possession of all the property left by Kishen Lal. The defence to the suit was, that subsequent to the death of her husband Kishen Lal, the defendant, in 1844, had adopted one Nemi Chand, in whom the whole estate had thereupon vested, and that she had consequently no power to make a second adoption; and that, in fact, she had not adopted the plaintiff.

It appeared that not long after the death of Kishen Lal the defendant had adopted Nemi Chand. Nemi Chand died in August, 1855, at the age of 13 years, without leaving either widow or child. The lower Court dismissed the suit, holding that the defendant had not adopted the plaintiff, and that she could not do so, the adoption of a second son not being valid, according to the precepts of the Jain religion.

The plaintiff appealed to the High Court, contending that the lower Court was in error in holding that his adoption by defendant was not established, and that the defendant had no power to make it.

(1) I. L. R., 1 All. 688; L. R., 5 Ind. Ap. 87.

Mr. *W. M. Colvin*, Mr. *C. H. Hill*, and Pandit *Ajudhia Nath*, for the appellant.

Mr. *G. E. A. Ross* and Mr. *T. Conlan*, for the respondent.

PETHERAM, C. J., and STRAIGHT, J. (After coming to the conclusion that the adoption of the plaintiff was established, observed as follows):—

But it is said for the respondent, even if this be so, that is something short of proof of an adoption to Kishen Lal. We do not feel pressed by this contention; if there was an adoption, in fact, we think it must be taken that it was an ordinary adoption to her deceased husband. It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son; and further, that no ceremonies or forms are necessary But, except that in these respects it is not controlled by the Hindu law of adoption, we think that in all others its principles and rules are applicable; and that the *Kritima* form of adoption not being recognised in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband.

The only remaining question of law is, whether the defendant having once adopted Nemi Chand after the death of her husband, and the whole estate having vested in him, she had the power to make a second valid adoption to her husband, so as to divest herself a second time of the property, and to vest it in the second adopted son.

It is contended on behalf of the defendant that upon the death of Nemi Chand, the estate of Kishen Lal vested in her as his heir, and not as the heiress of her deceased husband, and that it could not afterwards be divested so as to vest in another person as a second adopted son of her husband. This, however, does not seem to us to be the case, as the effect of the second adoption being to make the second adopted son the son of her husband, he must be treated as if he had been born, or at all events conceived, in the lifetime of the husband, and his title relates back

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to the date of the death of the elder brother, the first adopted son; so that if the elder brother has left no widow or child who would succeed him to the exclusion of his younger brother, a second adopted son succeeds as heir to the father.

This view seems to us to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of the deceased husband, and it appears to be in accordance with that taken by the Privy Council in the case of *Sheo Singh Rai* v. *Dakho* (1), and with the statement of the customs of the Jains as declared by Seth Raghunath Das and the other lay witnesses for the plaintiff. It is true there is a difference of opinion on the question of the custom among the expert witnesses, but in our opinion that of the lay witnesses is of infinitively more value on this point; and for those reasons we think that the defendant had power to make a valid adoption to her husband a second time, and that the adoption of the plaintiff was valid and effective.

1886 *May* 4.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

IDU (APPLICANT) v. AMIRAN (OPPOSITE PARTY.)*

Muhammadan law—Custody of children—Act IX of 1861, *s* 5—*Appeal.*

The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

Held that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

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* First Appeal No 45 of 1886 from an order of W. H. Hudson, Esq., Judge of Jaunpur, dated the 20th February, 1886.

(1) I. L. R., 1 All. 688; L. R., 5 Ind. Ap. 87.

Held also that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

The facts of this case are sufficiently stated in the judgment.

Mr. *W. M. Colvin*, for the appellant.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the respondent.

STRAIGHT, Offg. C. J.—This is an appeal from an order passed by the Judge of Jaunpur, on the 20th February last, rejecting an application made by the present appellant under s. 1 of Act IX of 1861. The parties are respectively husband and wife, and the minors, in regard to whom the application was made, are Yusaf Ali and Basit Ali, respectively aged 12 and 9 years, they being the sons of the appellant and respondent. At present they are in the possession of the respondent, and the application was to have them taken out of such custody and handed over to the appellant, their father. The Judge refused the application, and hence this appeal. It has been urged as an objection to our hearing the appeal that it has been preferred as an appeal from an order, whereas, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and it should have been made under the rules applicable to a regular appeal. Looking to the peculiar nature of the proceedings, it seems to me that this is a highly technical objection, and as all the evidence of the case is upon the record and is all taken down in English, it is clear that we should be only delaying the hearing of the appeal upon very inadequate grounds were we to accede to the learned Munshi's contention. We have therefore heard the case, and have no doubt whatever that upon the materials disclosed in the record, the learned Judge was wrong in rejecting the application made to him by the appellant. The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which, if my memory serves me rightly, the father's title to the custody of his children

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subsists from the moment of their birth; whilst, under the Muhammadan law, a mother's title to the custody of her children remains until they attain the age of 7 years. I may observe in passing that this principle of Muhammadan law was enunciated by my brother Mahmood, J., very recently in the determination of first appeal No. 129 of 1885 (1). *Primâ facie*, therefore, the appellant, who is the father of the two boys, was by law entitled to have them in his custody, subject always to the principle which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury. I do not say that this exhausts the considerations that might arise that would warrant the Courts in refusing an application for the custody of minors; but it is enough to say, in regard to the present case, that there is nothing in the record which discloses any proper grounds to justify the Court below in refusing to grant the application which the appellant made. Under these circumstances, the appeal is decreed with costs, the rejection of the application of the appellant is set aside, and his application is granted; and it is ordered that the respondent do, within one month from the date on which this order reaches the Court below, deliver up the two boys, Yusaf Ali and Basit Ali, into the custody of their father, the appellant; and it is further ordered that, in the event of respondent failing so to do, coercive measures to enforce this order, as provided in s. 260 of the Civil Procedure Code, may be adopted.

TYRRELL, J.—I concur.

Appeal allowed.

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Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SITA RAM (PLAINTIFF) *v.* AMIR BEGAM AND OTHERS (DEFENDANTS).

Muhammadan Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882 (*Transfer of Property Act*), *ss.* 78, 85—*Res-judicata—Civil Procedure Code, s.* 13—*Meaning of "between parties under whom they or any of them claim."*

Upon the death of *G*, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son *A*, one upon each of his five daugh-

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* First Appeal No. 129 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 23rd April, 1885.

(1) See next case.

ters, and one upon his widow *B*. The name of *B* only was recorded in the revenue registers in respect of the zamindari property left by *G*. In 1876, *A* and *B* gave to *X* a deed of simple mortgage of 2½ biswas out of a 5 biswas share of a village included in the said property. In 1878, *A* and *B* gave to *S* a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882, *X* obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by *X* himself in January, 1884 In February and November, 1884, the daughters of *G* obtained *ex-parte* decrees against *A* and *B* in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, *S* brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants *A* and *B*, *G's* daughters, and *X*, alleging that the decrees of February and November, 1884, were fraudulently and collusively obtained, and as to the auction-sale of January, 1884, that the 2½ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by *X* upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that *B's* position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against *A* and *B* in February, 1884, were conclusive, by way of *res-judicata*, against the plaintiff, who, as mortgagee from *A* and *B*, claimed under a title derived from them.

Held that there being no evidence to show that the decrees of February and November, 1884, were fraudulently and collusively obtained, the Court of first instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter

Khub Chand v. *Kalian Das* (1) and *Ali Hasan* v. *Dhirja* (2) referred to.

Per MAHMOOD, J.—According to the Muhammadan Law, the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even therefore if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the

(1) I. L. R., 1 All. 240. (2) I. L. R., 4 All. 518.

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rule of estoppel contained in s 115 of the Evidence Act, or the doctrine of equity formulated in s. 41 of the Transfer of Property Act, but here no such circumstances existed.

Also *per* MAHMOOD, J. —The decrees of February and November, 1884, did not operate as *res-judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party *claiming under* his mortgagors, within the meaning of s. 13 of the Civil Procedure Code, and that section must be interpreted as if, after the words "under whom they or any of them claim," the words "by a title arising subsequently to the commencement of the former suit" had been inserted. *Dooma Sahoo* v. *Joonarain Lall* (1) and *Bonomalee Nag* v *Koylash Chunder Dey* (2) referred to. *Outram* v. *Morewood* (3), *Boykuntnath Chatterjee* v. *Ameeroonissa Khatoon* (4), *Katama Natchiar* v. *Srimut Raja Moottoo Vijaya Raganadha* (5), and *Ram Coomar Sein* v. *Prosunno Coomar Sein* (6), distinguished.

The principles of the rule of *res-judicata*, as part of the law of civil procedure properly so called, and those of the rule of estoppel, as part of the law of evidence, explained and distinguished.

THE facts of this case were as follows:—

One Ghulam Rasul Khan died in 1872, leaving as his heirs his widow Amir Begam, a son called Ali Sher Khan, and five daughters called severally Wilayati Begam, Nihali Begam, Nawab Begam, Sakina Begam, and Jafri Begam. According to the Muhammadan law of inheritance his estate was divisible into eight shares, two of which devolved on the son, one on each daughter, and one on the widow. On his death the name of his widow only was recorded in the revenue registers in respect of the zamindari property left by him. This property included a five-biswa share of a village called Kadirganj. On the 17th October, 1876, Amir Begam and Ali Sher Khan gave one Alam Singh and certain other persons a simple mortgage of 2½ biswas out of the 5 biswas. On the 28th October, 1878, Amir Begam and Ali Sher Khan gave the plaintiff in this case a bond for Rs. 3,000, in which the 5 biswas, described as the widow's "own" property, was mortgaged by way of simple mortgage. On the 1st December, 1882,

(1) 12 W. R. 362.
(2) I. L. R., 4 Calc. 692.
(3) 3 East. 346.
(4) 2 W. R. 191.
(5) 9 Moo. I. A. 539.
(6) W. R., Jan.-July, 1864, p. 375.

Alam Singh and his co-mortgagees obtained a decree against Amir Begam and Ali Sher Khan for the sale of the mortgaged property, and caused it to be put up for sale, and bought it themselves, on the 31st January, 1884.

Subsequently Nihali Begam, Nawab Begam, Sakina Begam, and Jafri Begam, four of the daughters of Ghulam Rasul Khan, having sued their mother and brother for their shares by inheritance in the 5 biswas, obtained an *ex parte* decree against them on the 27th February, 1884 ; and Wilayati Begam, the fifth daughter of Ghulam Rasul Khan, also having brought a suit against Amir Begam and Ali Sher Khan for her share in the 5 biswas, obtained on the 24th November, 1884, an *ex parte* decree for the same.

In January, 1885, the plaintiff brought the present suit on the bond of the 28th October, 1878, in which he claimed Rs. 5,404-15, principal and interest, and the sale of the 5 biswas. Besides the executants of the bond, Amir Begam and Ali Sher Khan, he made the four surviving daughters of Ghulam Rasul Khan and the heirs of the fifth daughter, deceased, defendants to the suit; and also Alam Singh and the other purchasers of 2½ biswas of the 5 biswas. He prayed that he might be allowed to recover the amount due on the bond by the sale of the 5 biswas, "without any regard to the decrees of the 27th February, 1884, and the 24th November, 1884, and the auction sale of the 31st January, 1884." He alleged as to those decrees that they were fraudulently and collusively obtained, and as to the auction-sale, that the 2½ biswas were sold subject to his mortgage.

The Subordinate Judge of Mainpuri, by whom the suit was tried, held that the decrees impugned were not fraudulently and collusively obtained, and the shares of the daughters were not liable to be sold in satisfaction of the plaintiff's mortgage ; and that the portion of the 5 biswas purchased by Alam Singh and his co-mortgagees was not liable to be sold in satisfaction of the plaintiff's mortgage, his being a second mortgage; and gave the plaintiff a decree for the recovery of the money claimed by the sale only of the rights and interests of Amir Begam and Ali She Khan remaining in the 5 biswas.

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The plaintiff appealed to the High Court.

Mr. *C. H. Hill* and Munshi *Hanuman Prasad*, for the appellant.

Mr. *T. Conlan*, Mr. *W. M. Colvin*, Mr. *Abdul Majid*, and Pandit *Bishambar Nath*, for the respondent.

OLDFIELD, J.—This suit was brought on a bond dated the 28th October, 1878, executed by Amir Begam, widow of one Ghulam Rasul Khan, in consideration of an advance of Rs. 3,000. The plaintiff sought a decree for principal, with interest, and sale of the 5 biswas share in a village which the bond purported to hypothecate. The suit has been decreed in the Court below against the widow, Amir Begam, and against the son, Ali Sher Khan; but so far as it sought to make the shares of the five daughters of Ghulam Rasul Khan liable, and so far as it sought to interfere with a prior bond in respect of a 2½ biswas share of the property, and the right of the respondents Alam Singh and others (auction-purchasers), the plaintiff's suit was dismissed. The appeal is preferred by the plaintiff against that portion of the decision of the lower Court which was given against him.

The hypothecation-bond sued on purports to be made in the name of Amir Begam herself, in respect of her own property, acting on her own behalf and in her own right; and the suit also was brought on the allegation that the property hypothecated was owned and possessed by the executant of the bond; and it has not been brought on the footing that she held the property in any way for the other heirs of Ghulam Rasul Khan. The whole of the property hypothecated clearly was not held by her in her own right. The five daughters of Ghulam Rasul Khan had a right to shares in the same as heirs of their father, and for this right they brought suits and obtained decrees, as they were fully entitled to do. I do not see that there was any fraud or collusion, and, in my opinion, the lower Court was right in exempting this set of defendants from all liability to the plaintiff.

The next point urged, namely, that the appellant is entitled to bring to sale the property bought by the auction-purchasers Alam Singh and others also fails. The hypothecation-bond, upon which the decree and sale proceeded, was a prior one dated the 17th

October, 1876, and the property was purchased by Alam Singh and others on the 31st January, 1884. The appellant's hypothecation-bond being the later one, the transaction could only be questioned on the ground of fraud, of which there appears to be none whatever. For the above reasons the decision of the lower Court must be affirmed and this appeal dismissed with costs. The two sets of respondents will be entitled to costs in proportion separately.

MAHMOOD, J.—I am of the same opinion. The facts of the case are simple enough, namely, that the deceased Ghulam Rasul Khan died some time in the year 1872, leaving as his heirs, according to Muhammadan law, a widow named Amir Begam, a son named Ali Sher Khan, and five daughters named Jafri Begam; Wilayati Begam, Nawab Begam, Nihali Begam, and Sakina Begam. It is clear that immediately on the death of Ghulam Rasul Khan, according to the rigid system of inheritance which is to be found in the sacred texts of the Kuran, his property devolved in specific portions on these seven persons, who were his heirs. What happened afterwards was, that in respect of such of his property as consisted of land paying Government revenue, instead of the names of all the heirs being entered in the Government records, the name of the old lady alone was entered. This is often done among Muhammadans out of respect to the mother of a family; but on the part of the appellant there has, in the present instance, been a very faint attempt to make out that the Begam was put in possession of the whole property in this manner in lieu of dower. This might be made out, of course, where there were adequate grounds, and when such grounds were supported by adequate evidence. But in the present case there are no grounds for such a contention. It was further urged that her position as head of the family entitled her to deal with the property, so as to bind all the members of the family, though using her name only. But that is not so; and the argument of the learned pleader for the appellant upon this point seemed to me to proceed upon a confusion between the position of a Hindu widow and the legal *status* of a Muhammadan widow, as in this case. The surviving widow among Muhammadans, though looked on with respect by her own children or younger members of the family, holds a posi-

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tion very different to that of the widow among other nations, where the law of inheritance and succession proceeds upon other principles. The mother, being looked upon with respect and sympathy, would probably have the consent of her children to the entry of her name in lieu of her deceased husband's name as a mark of respect. An illustration of this is furnished by the unreported case of *Maulvi Inayat Rasul* v. *Khairunnissa*, decided by this Court on the 15th July, 1875. From all I have learnt of the present case, the entry of Amir Begam's name was entirely due to the notions and feelings which I have just described ; for if it had been to show a possession adverse to the five daughters, these people would not have been on such affectionate terms as it is shown they were. Amir Begam, I understand, was not the step-mother of these young ladies, but their own mother, and therefore no such argument as to adverse possession could be easily sustained. What happened after this record of the old lady's name was, that on the 17th October, 1876, she and her son, Ali Sher Khan, executed a hypothecation-bond in favour of the respondents Alam Singh and others, defendants No. 3. The bond was sued upon, and the 2½ biswas share was purported to be sold in enforcement of lien on the 31st January, 1884. I mention this to show the connection of Alam Singh and others, who purchased the property at that sale.

On the 27th February, 1884, four of these young ladies having sued their mother and their brother, obtained a decree for their shares of the property,—a circumstance which suggests the inference that they had heard of the alienations which their mother and brother had been making, and became anxious to secure their rights. The fifth lady, Wilayati Begam, similarly obtained a decree for her share on the 24th November, 1884. Both decrees were *ex-parte*, and this circumstance has been referred to as supporting the plaintiff's allegation of fraud and collusion, but I cannot admit that it does. The plaintiff's rights arose from the bond of the 28th October, 1878, which in no way could affect the share of these young ladies, unless, indeed, circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act (I of 1872), or the doctrine of equity formulated in s. 41 of the Transfer of

Property Act (IV of 1882). But here no such circumstances exist, for it is not shown or pretended that the young ladies, who are "*pardah-neshins*," by any declaration, act, or omission, intentionally caused or permitted the plaintiff to believe that their mother and brother were the exclusive owners of the property when the mortgage was made in the plaintiff's favour. Nor is it made out that the plaintiff is a *bonâ fide* transferee for value, in the sense of his having taken reasonable care to ascertain the title of his transferors. On the contrary, he knew that the property had been inherited from Ghulam Rasul, and he might easily have found out that there were other heirs besides the widow and the son.

Then, as to the decrees of 27th February, 1884, and 24th November, 1884, there is absolutely no evidence that these decrees, though *ex-parte*, were passed in collusion. I should say that it was impossible to contest those decrees, and the mother and son acted rightly in not defending the suits. On the other hand, the argument suggested on behalf of the respondents, that the decrees are conclusive against the plaintiff. seems to me to be unsound, though it raises an important question of law, which I shall decide in this case. In the case of *Dooma Sahoo* v. *Joonarain Loll* (1), the general principle was laid down by Dwarka Nath Mitter, J., that a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. The principle of the rule was subsequently adopted in *Bonomalee Nag* v. *Koylash Chunder Dey* (2) by Markby and Prinsep, JJ, who, however, complained of the paucity of case-law upon the subject, and adopted the rule, after expressing considerable hesitation and doubt, because Mitter, J., had not stated any reasons for the rule he laid down. With due respect to those learned judges, I cannot help feeling that there is no substantial ground for entertaining doubts upon the question, and I will take this opportunity of stating my reasons for this proposition.

The plea of *res-judicata* as a bar to an action belongs to the province of adjective law, *ad litis ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evi-

(1) 12 W R. 362. (2) I. L R., 4 Calc. 692.

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dence as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt with as belonging to the law of evidence, for there judgments *in personam*, which operate as *res-judicata*, are as often treated as falling under the category of estoppels by record Sir Fitz James Stephen, the distinguished jurist who framed our Indian Evidence Act (I of 1872), and whose views have been accepted by our Indian Legislature in framing s. 40 of that Act, adopted what seems to me the only logical and juristic classification by treating the rule of *res-judicata* as falling beyond the proper region of the law of evidence, and as appertaining to procedure properly so called. That the effect of the plea of *res-judicata* may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. But here the similarity between the two rules virtually ends; and it is equally clear that the *ratio* upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res-judicata* is founded. The essential features of estoppel are those which have found formulation in s. 115 of the Evidence Act, the provisions of which proceed upon the doctrine of equity (upon which s. 41 of the Transfer of Property Act is also based) that he who by his declaration, act, or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in Chapter VIII of the Evidence Act, relating to the estoppel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res-judicata* does not owe its origin to any such principle, but is founded upon the maxim *nemo debet bis vexari pro unâ et eâdem causâ*—a maxim which is itself an outcome of the wider maxim *interest reipublicæ ut sit finis litium*. The principle of estoppel, as I have already said, proceeds upon different grounds, and I think the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res-judicata* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe the difference between the plea of *res-judicata* and an estoppel, is to say that whilst

the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a *party*, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res-judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence. Further, the theory of *res-judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst "an estoppel," to use the words of Lord Coke, "is where a man is concluded by *his own* act or acceptance to say the truth," which means, he is not allowed, in contradiction of his former self, to prove what he *now* choses to call the truth. Thus the plea of *res-judicata* proceeds upon grounds of public policy properly so called, whilst an estoppel is simply the application of equitable principles between man and man—two individual parties to a litigation. I have given expression to these views because they explain and form necessary steps of the reasons upon which my ruling, as to the exact point before us, will proceed.

The question then resolves itself into this, whether the decrees of the 27th February, 1884, and the 24th November, 1884, which were obtained by the respondents in a litigation *commenced* subsequent to the plaintiff's mortgage of 1878, and to which litigation he was not a party, can be held to operate as *res-judicata* against him. And in this light the question seems to me to rest upon the interpretation of s. 13 of the Civil Procedure Code,—a section which has, before now, given rise to much judicial exposition. The main part of that section is as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, *or between parties under whom they or any of them claim*, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Here it is clear that the plaintiff was not a party to the former suit, and all that can be said in support of the argument, that he is bound by the former decrees, must proceed upon the hypothesis

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that, as mortgagee from Amir Begam and Sher Ali, he claims under a title derived from them. The merits of the argument depend upon the interpretation of the words emphasized by me in reading s. 13 of the Code: for the issue in this litigation as to the title of the plaintiff-respondent is the same as in the former suits, and the effect of the former decrees would be conclusive against the plaintiff, if he could in this litigation be treated as a party claiming *under* his mortgagors, within the meaning of the section. The section has been no doubt carefully framed, and has given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification. The difficulty of formulating such a rule is best illustrated by the fact that the language adopted by the Legislature in s. 13 of the Code of 1877 had to undergo considerable alteration when the present Code (Act XIV of 1882) was enacted. Further, as illustrating the difficulty, I may refer to what I said in *Sheoraj Rai* v. *Kashi Nath* (1) as to the interpretation of the word "*suit*" in the section, with reference to the Privy Council ruling in *Misir Raghobardial* v. *Sheo Baksh Singh* (2). But I have no doubt that in interpreting the language of that section, we cannot ignore the fundamental principles of the rule to which that section gives expression, unless, indeed, the express words of the statute clearly contradict those principles. Now, what is the meaning of *claiming under* as used in the section? There can be no doubt that the plaintiff in this case derives his right under the title which his mortgagors, Amir Begam and Sher Ali, possessed in the mortgaged property, and in this sense his title had been derived in privity to them; but is that privity subject to the adjudication of the 27th February, 1881, and of the 24th November, 1884? This really is the question upon which the determination of the point now before us depends; and I may add that the decision of the question must practically rest upon similar principles, whether we regard the matter as appertaining to the class of estoppels by record or to the rules of procedure properly so called. Further, in the decision of this point, the question whether the former decrees were passed in contested or uncontested suits would play no important part; for if the plaintiff can be properly regarded as privy to his mortgagors, for the pur-

(1) I. L. R., 7 All 247. (2) I. L. R., 9 Calc 439; L. R., 9 Ind. Ap. 197.

poses of this question, he would, in the absence of fraud, be concluded by *ex-parte* decrees as much as by decrees in contested suits, on the ground that a title hampered by either an estoppel or an adjudication cannot pass free of the consequences of such estoppel or such conclusive adjudication, in conformity with the principle which is the foundation of the maxim that he gives nothing who has nothing, —*nihil dat qui non habet.* But the maxim itself affords indications of another rule of law, that he who takes under another, is not bound by any acts which that other does subsequent to the grant. It is upon this principle that the law of mortgage recognizes the rule that no act of the mortgagor done subsequently to the mortgage can operate in derogation of the mortgagee's right. And I will presently show that it is upon the same principle that no estoppel incurred after the mortgage, and no conclusive adjudication as the result of a subsequent litigation by which the mortgagor is bound, can affect the rights of the mortgagee. The reasons of the rule are nowhere stated better than by the eminent American writer Mr. Bigelow, in his celebrated treatise on the law of estoppel (at page 91), and I will quote him here as adopting his language at the risk of prolixity :—

"Having ascertained the effect of judgment estoppels upon the actual parties to the record, let us now inquire into the effect and operation of personal judgments against those who were not strictly or nominally parties to the former suit, but whose interests were in some way affected by it. And first of privity, which, by Lord Coke, is divided into privity in law —*i.e.*, by operation of law, as tenant by the courtesy ; privity in blood, as in the case of ancestor and heir ; and privity in estate—*i.e.*, by the action of the parties, as in the case of feoffor and feoffee. These divisions are only important in defining the extent of the doctrine of privity ; and as the rules of law are not different in questions of estoppel in these divisions, it will not be necessary to present them separately. But it should be noticed that the ground of privity is property and not personal relation. Thus an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment has preceded the assignment the case would have been different ; hence privity in estoppel arises by virtue of succession.

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Nor is a grantee of land affected by judgment concerning the property against his grantor in the suit of a third person begun after the grant. Judgment bars those only whose interest is acquired after the suit, excepting of course the parties."

The principles stated in this passage are supported by many cases, chiefly American, which the learned author cites in the pages that follow. Speaking for myself, I am perfectly prepared to accept this enunciation of the law as applicable to Indian mortgagees, because, whilst there is nothing in s. 13 of the present Civil Procedure Code to contradict my view, my notions of jurisprudence are consistent with what I have said. Looking to the definition of mortgage as contained in the first paragraph of s. 58 of the Transfer of Property Act (IV of 1882) and to cl. (*b*) of the same section, which defines simple mortgages, I am of opinion that hypothecation or simple mortgage, as understood in this country, is, in the eye of jurisprudence, a species of what are known as *jura in re aliena*, that is, estates carved out of full ownership, and that when such an estate has once been created, the mortgagor cannot represent it in any subsequent litigation. And, to use the words of Mr. Bigelow, "it should be noticed that the ground of privity is property and not personal relation." And if this is so, the estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; for the simple reason that a decree of Court in such cases can neither create new rights, nor take away existing ones, but can only enforce the rights as they stand between the parties, and in enforcing such rights, cannot go beyond the rights of the parties to the litigation.

The effect of this view no doubt is to go somewhat beyond the letter of the statute, though not to contradict a single expression employed in s. 13 of the Civil Procedure Code. To put the matter concretely, I interpret that section as if after the words "*under whom they or any of them claim*," the words "*by a title arising subsequently to the commencement of the former suit*," existed in the section; and I think I am within the recognised rules of interpretation when I read the section in this manner.—*Vide* Chap. IX, Maxwell on the Interpretation of Statutes, p. 274, &c.) Indeed, as a pure question of analogy, I may refer to the words in cl. (*b*),

s. 27 of the Specific Relief Act (I of 1877), which are similar to those which I have interpreted in s. 13 of the Civil Procedure Code, as fortifying my view, because the ultimate principle upon which a specific performance of contracts may be enforced against those who were not actual parties to the contract itself, proceeds upon principles analogous to those upon which a judgment *in personam* against a party operates as *res-judicata* against those who claim under him,—the question of notice needing proof in the one case, and in the other being presumed under a doctrine similar to the one upon which constructive notice by *lis pendens* is founded.

I will now deal with the cases which were cited before Markby and Prinsep, JJ., in *Bonomalee Nag* v. *Koylash Chunder Dey* (1) as opposed to the view which I have expressed. The case of *Outram* v. *Morewood* (2) does not touch the question, because all that Lord Ellenborough held in that case was, that the matter which had been adjudicated upon in a previous litigation as against Ellen Morewood (she being then sole), before her husband had any right to the subject-matter of the litigation, could not be re-opened in a subsequent litigation between the same parties, though such litigation may have had a different form or object. This clearly is not the case here. Again, the next case—*Boykuntnath Chatterjee* v. *Ameeroonissa Khatoon* (3) does not apply either, because a purchaser at a sale for arrears of Government revenue takes a title which is regulated by special legislation, which cannot govern cases such as the present. The case of *Katama Natchiar* v. *Srimut Raja Moottoo Vijaya Raganadha* (4) would at first sight seem more to the point, but it really is not applicable, because the equity of redemption possessed by a mortgagor is vastly different to the estate of a Hindu widow, who, as the Lords of the Privy Council (at page 608) point out, is an absolute owner for some purposes; and the question whether a conclusive adjudication against her, *quoad* the estate, would bind the reversioners, would naturally depend upon the nature and *bonâ fides* of the litigation The position of a mortgagee is in no sense similar to that of a Hindu reversioner, and it follows that the same rule would not be applicable to both. Nor has the case of *Ram Coomar Sein* v.

(1) I. L. R., 4, Calc 692.
(2) 3 East. 346.
(3) 2 W. R. 191.
(4) 9 Moo. I. A. 539.

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Prosunno Coomar Sein (1) any bearing upon the present question, simply because a person who acquires a prescriptive title by adverse possession under the law of limitation, is not bound to respect any contracts entered into between the mortgagor and the mortgagee, to both of whom his possession is adverse—a state of things which is not applicable to the present case, even by analogy. There is thus no authority against the view which I have enunciated at such length, and I hold that, after a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive as against, such mortgagee. Applying this conclusion to the present case, I hold that the decrees of 27th February, 1884, and 24th November, 1884, do not operate as *res-judicata* against the plaintiff-appellant.

But whilst the decrees are not conclusive against the plaintiff, it should be noticed that the present suit was brought to enforce his lien, not only against the shares of his mortgagors, Amir Begam and Ali Sher Khan, but also against the shares of the five daughters; and further, also against the property purchased by Alam Singh and others, covered by the hypothecation of the 17th October, 1876. The simple issue therefore in the case is, as my brother Oldfield has put it—Has the plaintiff acquired, under the hypothecation-bond of the 28th October, 1878, any lien over more than Amir Begam and Ali Sher Khan possessed in their own right at the time they executed the bond? I have already said that the position of a Muhammadan widow in respect of her deceased husband's estate, is ordinarily nothing more or less than that of any other heir, and I will here add, with reference to what has been urged on behalf of the appellant, that even in case of minority of her children, she cannot exercise any power of disposition with reference to their property, because she cannot act as their guardian in respect of such matters. Under certain limitations, she may act as guardian of the person of her children till they reach the age of discretion, but the control of their property never vests in her without special appointment by the ruling

(1) W. R., Jan.—July, 1864, p. 375.

authority, in default of other relations who are entitled to such guardianship. The facility of divorce on the one hand, and of remarriage of widows on the other, account for this doctrine of the Muhammadan law. So that, even if some of the daughters were minors, as is suggested here, at the time of the plaintiff's mortgage, their shares could not be affected by the transfer. Then, of course, there is also the important fact that the widow in executing the mortgage now sued upon, did not profess to act on behalf of her daughters. And therefore on neither hypothesis can their shares be subjected to the lien which the plaintiff seeks to enforce in this litigation.

Now as to the remaining defendants Alam Singh and others, it is urged on behalf of the plaintiff-appellant that, inasmuch as he was not made a party to the suit for enforcement of lien on the bond of the 17th October, 1876, therefore he is not bound by any proceedings which took place upon that bond, including the sale of the 31st January, 1884. This argument has only partial force, but cannot prevail. The law, as it stood before the Transfer of Property Act, as to the necessity in a suit by a first mortgagee of making a subsequent mortgagee a party, was explained by me in *Ali Hasan* v. *Dhirja* (1), following the ruling of Turner, J., in *Khub Chand* v. *Kalian Das* (2). It was there held that it was not absolutely necessary to make puisne incumbrancers parties to a suit by a first mortgagee, and that a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is conclusively presumed in jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer could of course escape the decree by proving fraud or collusion, or he might prevent the sale in enforcement of the prior incumbrance by redeeming it. But if neither conditions are satisfied, sale in enforcement of the prior incumbrance would defeat the puisne incumbrance. Since the passing of the Transfer of Property Act (IV of 1882), it seems, under certain conditions, necessary, according to s. 85 of the Act, to make puisne incumbrancers parties, with the result that if they do not redeem, their lien will be defeated in the absence of fraud, which might disturb the rule of priority

(1) I. L. R., 4 All. 518. (2) I. L. R., 1 All. 240.

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under conditions such as those contemplated by s. 78 of the Transfer of Property Act (IV. of 1882). But no such case is set up here, and I therefore concur with my brother Oldfield in the order which he has made.

Appeal dismissed.

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ORIGINAL CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice.

G. S. JONES (PLAINTIFF) *v.* H. LEDGARD AND OTHERS (DEFENDANTS).

Arbitration—Filing award in Court—Civil Procedure Code, ss. 525, 526—Partnership—Agreement to refer disputes to arbitration.

The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed but they refused to do so. The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s 520 or s. 521 of the Code.

Held that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *primâ facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox* v. *Storkey* (1) and *Re Newton and Hetherington* (2) referred to.

Held also that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of the award must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that

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*Suit No. 1 of 1886.

(1) L. R., 1 C. P. 671. (2) 19 C. B. (N. S.) 342.

this or that ground referred to in ss. 520 and 521 existed against the filing *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1) and *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (2) dissented from. *Dutto Singh* v. *Dosad Bahadur Singh* (3), *Dandekar* v. *Dandekars* (4), and *Chowdhry Murtaza Hossein* v. *Bechunnissa* (5) referred to.

THIS was an application to file and enforce an award, dated the 30th March, 1885, under the provisions of ss. 525 and 526 of the Civil Procedure Code.

The application was made to the Subordinate Judge of Cawnpore, and, having been numbered and registered as a suit, was subsequently transferred to the High Court for trial.

The applicant was Gavin Sibbald Jones, and the other parties were William Wilson and Henry Ledgard, executors of the last will and testament of Henry Charles Bovan Petman. It was stated in the application that the said G. S. Jones, James Hunt Condon and H. C. B. Petman carried on business together at Cawnpore as Wool Manufacturers, under the style of the "Cawnpore Woollen Mills Company" from the 18th April, 1878, to about the 3rd August, 1882, under a deed of partnership, dated the 18th April, 1878; that divers differences and disputes having arisen between the said G. S. Jones, J. H. Condon, and H. C. B. Petman with respect to the accounts relative to the said trade, which embraced also a claim made by one Jai Dayal against the Company, (and which had been paid by the said G. S. Jones), he the said G. S. Jones and the said J. H. Condon, in accordance with the provisions of the 32nd clause of the deed of partnership dated the 18th April, 1878, called upon the said William Wilson and Henry Ledgard as such executors as aforesaid by a letter dated the 25th March, 1885, requiring them, *inter alia*, to refer the said disputes to arbitration; that the said Henry Ledgard as one of such executors as aforesaid replied to the said letter on the 25th March, 1885, protesting against any resort to arbitration, whereupon he the said G. S. Jones and J. H Condon, by an agreement dated the 27th March, 1885, referred the said disputes to the arbitrament of Samuel Maurice Johnson, who by virtue of the powers conferred upon him by the deed of partnership and the said agreement of the 27th March, 1885, nominated

(1) I. L, R., 7 Calc. 490.
(2) I. L. R., 9 Calc, 557.
(3) I. L. R, 9 Calc. 575.
(4) I. L. R, 6 Bom. 663.
(5) L. R., 3 Ind. Ap. 209.

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the Reverend George H. McGrew as the other arbitrator; that the said arbitrators, (having first duly nominated Samuel Burton Newton as their umpire) did on the 30th March, 1885, duly make and publish their award in writing concerning the matters referred to them, and ordered, amongst other things, that the several payments in the said award directed to be made should be made within three months from the date of the award; and that the said H. Ledgard and W. Wilson as such executors as aforesaid and the said J. H. Condon had had due notice of the publication of the said award, but they had not paid the sums therein directed to be paid to him, the said G. S. Jones.

The prayer in the application was that the Court would, in accordance with the provisions of ss. 525 and 526 of the Civil Procedure Code, order that the said award should be filed, and further that it would give judgment in accordance therewith and pass a decree thereon.

On the 16th March, 1886, on the application of the executors, Mary Petman, widow of H. C. B. Petman, was joined as a defendant.

On the 28th April, 1886, H. Ledgard filed a written statement in which he stated as follows:—

"1. That undersigned has been the acting executor of the said Henry Charles Bevan Petman's estate, since grant of probate of the same to undersigned with William Wilson of Delhi, his co executor, by this Honourable Court in the month of March, 1885.

2. That in discharge of the duties imposed upon undersigned as such executor, undersigned had occasion to write a letter on the 25th March, 1885, to Mr. T. Lewis Ingram, barrister at-law, Lucknow, who was then acting as counsel for the said Gavin Sibbald Jones and James Hunt Condon, Civil Surgeon of Cawnpore, in the following terms, that is to say:—

'Cawnpore, March 25th, 1885, Lewis Ingram, Esq., (Lucknow).

Dear Sir,—In reply to your letter of January 24th and in continuation of mine of 27th *idem* and February 26th, I beg to inform you that probate of the will of the late Mr. H. C. B. Petman has now been granted in favour of Mr. Wilson and myself.

'We have taken the opinion of the late Mr. Petman's legal adviser and of independent counsel on the subject of the claim you make against the estate on behalf of Mr. G. S. Jones and Dr. Condon, and which you desire to refer to arbitration. In reply thereto I beg to invite your attention to Mr. Howard's (the late Mr. Petman's counsel) letter to you of January 26th, 1884, which was written

during Mr. Petman's life-time, and to state that we do not feel justified in departing from the course he then adopted, and that we, therefore, protest against any resort to arbitration in the matter, and further we deny the liability in respect of the claim put forward by Messrs. G. S. Jones and Dr. Condon.

'As I purpose leaving for England the end of the current week, I shall be much obliged by your addressing any further communication on the subject to Mr. William Wilson of Delhi.

I am,
Your's faithfully,
(Sd.) H. LEDGARD,

Executor for the estate of the late Mr. H. C. B. Petman.'

3 That despite the protest contained in the said letter and refusal on the part of the undersigned to join in any reference to arbitration, the said Gavin Sibbald Jones and James Hunt Condon professed to make a submission to arbitration on the part of the estate of the said Henry Charles Bevan Petman under a deed of co-partnership entered into on the 18th day of April, 1878, between the three aforesaid parties for the term of 500 years, but which was superseded and which said partnership was altered and a new partnership substituted by the addition of two new partners, to wit, William Earnshaw Cooper and George William Allen, who formed a new partnership with the aforesaid three persons on the 22nd day of December, 1881, whereby there was a complete novation in respect of the capital of the said partnership concern, the term of duration of the said business which was reduced to one hundred years, and the good-will thereof; and the said last mentioned partnership was further absolutely dissolved and determined in August, 1882, when the said five co-partners formally transferred the stock and good-will of their business to a Limited Liability Company incorporated under the Indian Companies' Act.

4. That the matters of account forming the matter of the said alleged reference to arbitration, an award in which is sought to be filed against the executors of the said Petman's estate, were the subject-matter of a civil suit instituted by one Jai Dayal Chaubé of Cawnpore, in the Court of the Subordinate Judge of Cawnpore, on the 29th March 1882, against the partners of the said Woollen Mills Company for a sum of Rs. 29,104, with interest, and in which the said Gavin Sibbald Jones was a confessing defendant, whilst the said Henry Charles Bevan Petman and the said James Hunt Condon successfully defended the same, and the said Subordinate Judge of Cawnpore, on the 3rd February, 1883, dismissed the said suit with costs in favour of the said defendants, which said judgment and decree were never appealed from by the said plaintiff and became final as between the said parties.

5. That in the course of the said judgment of the said Subordinate Judge of Cawnpore, the learned judge commented in strong and unfavourable terms on the conduct of the said Gavin Sibbald Jones in relation to his private dealings with the said Jai Dayal Chaubé and his conduct towards his said co-partners in connection therewith.

6. That for nearly a whole year subsequently to the dismissal of the said suit, and for nearly two years subsequently to the formal dissolution of the said

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partnership by incorporation in a public company, the said Gavin Sibbald Jones and the said James Hunt Condon, whilst the said Henry Charles Bevan Petman was in India, made no attempt to raise any question as to the said matters or any others relating to the said dissolved business, and it was not until the said Henry Charles Bevan Petman retired to England during the winter of 1883 that any proposal was made to him to submit the said questions to arbitration, and the said Henry Charles Bevan Petman at once repudiated any liability for accounting to his said co-partners by arbitration or otherwise, with respect to any of the said matters alleged to be in dispute between the said persons, and on the 26th January, 1884, Mr. Petman's standing counsel, Mr. Howard, formally communicated the said refusal and objection on the part of the said H. C. B. Petman to Mr. Ingram aforesaid, who was then acting as counsel for the said Gavin Sibbald Jones and the said James Hunt Condon.

7. That notwithstanding the above refusal, nothing was done to submit the said matters to arbitration, until after Mr. Petman's death had deprived his estate of such evidence as he himself might have adduced before any Court in which the award, if given during his lifetime, had been sought to be filed.

8. That the award said to have been made in pursuance of the aforesaid reference to arbitration to which undersigned was no party is bad, upon the face of it, for the following, amongst other, reasons :—

(*a.*) Because it is made and purports to consider and weigh evidence which it took the said Subordinate Judge of Cawnpore several months to record, and professes to scrutinize items of account without, as stated in the said award on the face of it, any examination of vouchers or witnesses, on the 30th day of March, 1885, the very day and date on which one of the said arbitrators, to wit George Harrison McGrew, was appointed by Samuel Maurice Johnson, the arbitrator for Messrs. Jones and Condon, to consider, in the interests of the said Petman's estate, the various matters in dispute discussed in the said award, thus bearing evidence upon the face of the same of all absence of due regularity and propriety in the proceedings of the said arbitration :

(*b.*) Because the said award avowedly on the face of it revises and reverses the findings and reasons of the said Subordinate Judge of Cawnpore with respect to the various matters treated and finally disposed of in his said judgment dated 3rd February, 1883, in the suit of the said Jai Dayal Chaubé, and makes the said partnership responsible for sums expressly disallowed as not due by the said judgment.

(*c.*) Because the said award, whilst professing to deal with a reference between the co-partners relating to a dispute alleged to exist between them concerning a partnership business, in effect and throughout the main provisions thereof deals with the claims of the said Jai Dayal Chaubé, an outsider, against the members of the said partnership, and the money award made by the said arbitrators against the said Petman's estate is in effect a decree of the said Jai Dayal's claim as against all the three said co-partners.

9. That the said Gavin Sibbald Jones, in the application before this Honorable Court to file the said award against the estate of the said H. C. B. Petman, avowedly bases the claim to file the same as against undersigned on a voluntary payment and discharge of the claim of the said Jai Dayal Chaubé alleged to have been made (at some time not specified) by the said Gavin Sibbald Jones, and as such no payment made by the said Gavin Sibbald Jones can bind the said Petman's estate.

10. That the said Gavin Sibbald Jones was further not entitled to make the said reference to arbitration as against the estate of the said H. C. B. Petman under the 32nd clause of the deed of co-partnership referred to in his said application to file the said award, within the true meaning and intent of the said deed of co-partnership.

11. That the claim of the said Gavin Sibbald Jones to file the said award under the provisions of ss 525 and 526 of the Code of Civil Procedure is bad in law, in that it is contrary to the provisions of s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act, and the award deals with items of account on which a suit would be barred by limitation.

12. That the rights of minor children of the said H C. B. Petman are involved in the administration of the said estate, and undersigned prays that for the reasons above set forth the said claim to file the said award as against the estate of the said H. C. B. Petman be dismissed with costs in favour of undersigned as executor of the said estate."

On the same day William Wilson filed a written statement, in which he stated as follows :—

"1. That he joined with one Henry Ledgard of Cawnpore in obtaining probate of the will of the late Henry Charles Bevan Petman deceased from the Honorable the High Court of Judicature for the North-Western Provinces on the 2nd day of March, 1885.

2. That since the said date the undersigned has joined with the said Henry Ledgard in administering to the said estate, and jointly with the said Henry Ledgard delined to join any reference to arbitration of matters connected with the said estate.

3. That undersigned denies the right of any person joining in the said reference to arbitration to bind the estate of the said H. C. B. Petman behind the back of the duly authorized representatives of the said estate by *ex-parte* proceedings, had, not between existing co-partners of a subsisting business, but by persons who at the time of the said reference were acting outside the scope and powers of the 32nd paragraph of a deed of co-partnership which was terminated in December, 1881, and relating to items connected with accounts of the year 1879, which had formed the subject of litigation between the parties in the year 1882, and which said litigation was finally concluded and determined by a judgment and decree of the Subordinate Judge of Cawnpore, dated the 3rd February, 1883, which became final and binding in the premises.

4. That the award made by the said arbitrators is illegal and bad on the face thereof.

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5. That the attempt on the part of the plaintiff to make the same a rule of Court is contrary to the terms of s 28 of the Indian Contract Act and s. 21 of the Specific Relief Act.

6. That under the provisions of s. 526 of the Civil Procedure Code this Honourable Court should dismiss the said application to file the said award with costs in favour of undersigned defendant"

On the 5th May, 1886, H Ledgard filed a supplementary written statement, in which he stated as follows :—

"1 That the appointment of the Reverend George Henry McGrew as an arbitrator is bad in consequence of the failure of the plaintiff to comply with the provisions of the 32nd clause of the deed of co partnership.

2 That the defendants were never served with notice of the date or place of arbitration and had no knowledge thereof prior to the making of the award, and the so-called arbitrators made their award without giving the defendants the opportunity of producing evidence if they had been so advised or of being heard."

On the same day the Court framed the following preliminary issue for trial :—

"Looking to the language of clause 32 of the partnership-deed of the 18th April, 1878, and to the circumstances under which the arbitration-proceedings were held, were the defendants in law parties to the arbitration-proceedings, and so bound by the award in the sense of the procedure laid down in ss. 525 and 526 of the Civil Procedure Code."

The 32nd clause of the deed of partnership of the 18th April, 1878, ran as follows :—

"That in case any dispute or difference shall at any time arise between the said partners, or any partner or partners that may hereafter be admitted into the business with the aforesaid consent of all the parties to these presents, or between the survivors of them and the heirs, executors or administrators of a deceased partner or partners, touching or concerning the said business or any matter or thing herein contained or in any wise whatsoever relating to the said partnership business, or any of the affairs thereof, or concerning the true meaning and intent of these presents, the said dispute or difference shall, upon the request in writing of either of the said parties be referred to the arbitration of disinterested or indifferent persons to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partners or representative of a deceased partner, and in case any of the said partners in difference or their or his heirs, executors and administrators shall refuse neglect or fail to nominate an arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate

another indifferent person to be umpire, and the said arbitrators shall make their award in writing within thirty days next after such reference shall be made, or in case the said arbitrators shall not make the award within the time last mentioned, then the matter in difference shall be submitted to the said umpire, who shall make his award in writing within thirty days next after the said matter shall have been so referred to him either by the arbitrators or by the parties or any or either of them, and such arbitrators and umpire or any or either of them shall have full power to examine the said parties and their respective witnesses, on oath or otherwise, and to call for and require the production of all books, papers deeds, letters, vouchers, documents and writings that they or he shall think necessary, and shall have all the power and authority given by the statute in that behalf, and the award of the said arbitrators, and the umpirage of the said umpire as the case may be, shall be final and conclusive between the said parties, and to this end it is equally understood and agreed that any submission or reference to arbitration under or by virtue of these presents, shall and may from time to time be made a rule of the Civil Courts of Cawnpore aforesaid, and be binding upon all the said partners under the provisions of ss. 525 and 526, Act X of 1877, otherwise called the new Code of Civil Procedure."

Mr. *T. Conlan* and Mr. *G. E. A Ross*, for the plaintiff.

Mr. *J. E Howard* and Mr. *C. H. Hill*, for Henry Ledgard and William Wilson, executors of the deceased H. C. Petman.

Mr. *Ross Alston*, for Mary Petman, widow of H. C. Petman,

STRAIGHT, Offg. C. J.—This is an application by Gavin Sibbald Jones, under s. 525 of the Civil Procedure Code, asking to file an award, dated the 30th March, 1885. Notice was issued to the parties said to have been affected by the award, and who are also alleged to have been parties to the arbitration, to show cause why the award should not be filed; and they have now appeared and lodged verified petitions, setting forth the grounds on which they maintain that the application ought not to be granted. Before dealing more immediately with the application and the sections relating to it, namely, ss 525 and 526 of the Code, I think it desirable, by way of preliminary, and for the purpose of explaining my views, to examine the provisions of Chapter XXXVII of the Code in which those sections are to be found. These provisions have been framed to provide for three things,—*first*, a reference to arbitration by consent of the parties in the course of a suit; *secondly*, means for making an agreement to refer, or the submission to arbitration, a rule of Court, and so seizing the Court of the matter, and giving it jurisdiction over

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the award subsequently passed on the reference; and, *thirdly*, for an application by the parties who have entered into a private agreement under which an arbitration has been held, to file the award which is its outcome. These are three clear, distinct, and separate matters with which a Court has power to deal under Chapter XXXVII. As regards the first, I need say nothing, because its nature is well understood. With reference to the second, it appears to me that what was contemplated was, that the parties, having entered into an agreement to refer, could come to a Civil Court and ask it to make the agreement a rule of Court, and thus not only give the Court power to deal with any award made subsequently, but also jurisdiction over the arbitrators, so as to entitle it to exercise the powers which a Court, making a reference in a suit, would have under ss. 518, 520, and 521. That these provisions apply to this second class of matters, is shown by s. 524, which says:—"The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of the decree founded thereupon." But ss. 525 and 526, with which we are more particularly concerned, present a different state of things. The parties having by private agreement gone to arbitration, and an award having been obtained, any one of them may come to the Civil Court and have the award filed *in invitum* against the others, unless they can show that the award is open to objection on any of the grounds mentioned in s. 520 or s. 521. It is clear from the limitation mentioned in s. 526, which specifically confines the objections that may be taken to those referred to in s. 520 or s 521, that the Court considering whether the award should be filed has no power to touch the terms of the award; and, if the ground of misconduct or other matters referred to in those sections are disclosed, the Court must refuse to file the award. Now, what is the effect of filing the award? The award, if filed, is to have the effect of an award under the provisions of this chapter. This means that when a Court resolves to file the award, having in this case determined beforehand whether any objections under s. 520 or s. 521 have been satisfactorily put forward, there must be a judgment and decree passed there and

then, and the award must be turned into a decree in the manner contemplated by s. 522. Whereas, in the one case, in cases referred by the Court in a suit, or in case of reference by an agreement by parties, which has been made a rule of Court, objections are to be entertained after the award has come back to the Court; in the other, the objections are preliminary to the award being filed.

In the present case the defendants have made two main objections to the filing of the award. In the first place, it has been contended that Messrs. Wilson and Ledgard, as executors of the deceased Petman, were not parties to the arbitration proceedings, and therefore cannot be bound by them; in the second place, it has been contended that, assuming them to have been parties, still, they having filed verified statements, which, upon the face of them, disclose grounds of objection within the meaning of s. 520 or s. 521, I must at once stay my hand, and cannot proceed to inquire into the "*bonâ fides*" or validity of those objections.

As regards the first point, it seems to me the answer is to be found in the language of cl. 32 of the partnership-deed. That partners may, in a partnership-deed, contract that future disputes shall be settled in a particular manner which ousts the jurisdiction of the ordinary tribunals, is undoubted, and is a condition which is recognized by the Courts. In saying this, I may refer to *Willcox* v *Storkey* (1). In the argument in that case, Erle C. J., referred to *Re Newton and Hetherington* (2), the effect of which is, that where the parties have agreed to refer matters of difference arising between them with regard to partnership matters to arbitration, they are bound by such agreement and by any proceedings that may be adopted thereunder. Moreover, it is laid down at p. 63 of Russell's work on Arbitration that "when the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the referees were named in the clause itself." In my opinion, by cl. 32 of the partnership-deed now before me, the parties to it did agree that they would submit their partnership disagreements to arbitration, for they said in terms

(1) L. R, 1 C. P. 671. (2) 10 C. B. (N. S.) 342.

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that if any difference should arise, "the said dispute or difference shall, upon the request in writing of either of the said parties, be referred to the arbitration of disinterested or indifferent persons, to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partner or representative of a deceased partner, and"—this is the most material passage—"in case any of the said partners in difference, or their or his heirs, executors, and administrators, shall refuse, neglect or fail to nominate an arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate another indifferent person to be umpire." Now, on the 24th January, 1885, Mr. Ingram as representing the present applicant, wrote to Messrs. Wilson and Ledgard, stating as follows:—"My clients purpose referring their claim to arbitration under the terms of the deed of partnership, but have no desire to avail themselves of the power to force on an arbitration without you. I shall therefore be glad if you will inform me at your convenience whether it is your wish to join in the arbitration or not." That letter was not directly answered till the 25th March, when Mr. Ledgard replied to it in these terms:—"We have taken the opinion of the late Mr. Petman's legal advisers and of independent counsel on the subject of the claim you make against the estate on behalf of Messrs. G. S. Jones and Dr. Condon, and which you desire to refer to arbitration. In reply thereto, I beg to invite your attention to Mr. Howard's (the late Mr. Petman's counsel) letter to you of the 26th January, 1884, which was written during Mr. Petman's lifetime, and to state that we do not feel justified in departing from the course he then adopted, and that we therefore protest against any resort to arbitration in the matter, and further that we deny the liability in respect of the claim put forward by Messrs. G. S. Jones and Dr. Condon." Having given this matter my best attention, and having put the best construction upon this letter that I can, I am of opinion that it amounts to a distinct refusal on the part of Mr. Howard's clients to the nomination of an arbi-

trator, or to do anything in connection with arbitration proceedings. In consequence of the letter, Mr. Jones and Dr. Condon, by an agreement dated the 27th March, 1885, reciting all the matters concerned in the submission, agreed to refer the matters in difference to the arbitration of one Samuel Maurice Johnson. This agreement purported to be drawn up in accordance with cl. 32 of the partnership-deed. Mr. Johnson, in his turn, in conformity with the terms of the clause, nominated one George McGrew, and on the 30th March, a third person, Samuel Burton Newton, was formally appointed umpire. All that I need say is, that it appears to me there is sufficient reason to show that Messrs. Wilson and Ledgard are "*primâ facie*" bound by the arbitration proceedings so as to bring them within the terms of s. 525 of the Civil Procedure Code, as parties to the arbitration, who should be called on to show cause why the award should not be filed. Mr. Hill has contended that the word "parties," as used in s. 525, applies only to persons who are actually before the arbitrators. But I do not think I ought to place so narrow a construction upon the terms of the section. If parties, by an agreement, have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, it appears to me that for the purposes of s. 525 they should be regarded as parties to that arbitration. Were I to hold otherwise, they would have no power to appear before me, as in the present case, to lodge objections, with the result that no alternative would be open to me than to order the award to be filed. I think therefore that the first objection fails, and it is to the defendants' interest that it should do so. With regard to the second objection, namely, that the defendants having filed a verified petition, which discloses grounds of objection within s. 520 or s. 521, I should at once and without inquiry stay my hand, and refuse to file the award, leaving the parties to a regular suit upon the award, in which all matters relating to their differences might be investigated. Mr. Howard and Mr. Hill have cited two rulings by two learned Judges, for whose opinions I entertain the very highest respect, and from whom I should hesitate in differing, unless I felt constrained to do so. The first of these is *Sree Ram*

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Chowdhry v. *Denobundhoo Chowdhry* (1) in which Pontifex, J., if I may say so with impropriety, appears to have somewhat unnecessarily gone out of his way to place a construction upon the meaning of the words "show cause" as mentioned in s. 525 and "ground" in s. 526. In *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (2) Wilson, J., dealt with the point, and decided in effect that the contention now urged by Mr. Howard and Mr. Hill is sound, and is a correct view of the statute. Before examining the terms of the sections, I think it right to mention that Field, J., who, with Pontifex, J., heard the appeal in *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (1), expressed no opinion upon the point, and that Macpherson, J., in the other case to which I have referred, observed that he would "hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no inquiry." In *Dutto Singh* v. *Dosad Bahadur Singh* (3) two learned Judges, Mitter and O'Kinealy, JJ., in terms expressed their dissent from the judgment of Wilson, J., in *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry* (2). Now let us see what is the language of the section. Under s. 525, what is required is that the parties, other than those applying, must "*show cause.*" As observed by Melvill, J., in *Dandekar* v. *Dandekars* (4) this is a perfectly well understood expression. I do not agree with Mr. Howard's suggestion that because the word "ground" is used in s. 526, the meaning of the expression "show cause" in s. 525 is cut down. It appears to me that if these sections are read together, they mean that the party coming forward must show cause, that is to say, must establish by argument, or proof, or both, reasonable ground for the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521. It is important to notice that ss. 525 and 526 in the present Code represent no novel principle. In s. 327 of Act VIII of 1859, the same provision occurred, except that the words there used were "*sufficient* cause." I find that their Lordships of the Privy Council, in dealing with an appeal relating to an award that had been filed under s. 327, went very elaborately into the grounds put forward by those who opposed the filing of the award in the Court below, and it seems to me that the remarks of

(1) I. L. R., 7 Calc. 490 (3) I. L. R., 9 Calc. 575.
(2) I. L. R., 9 Calc. 557. (4) I. L. R., 6 Bom. 663.

their Lordships favour the view I take of the provisions of the existing Code. I do not think that because the words "sufficient cause" in s. 327 of the Code of 1859 have been altered to "ground such as is mentioned or referred to in s. 520 or s. 521" in s. 526 of the present Code, the whole scope of the section has been altered, as the interpretation of Wilson and Pontifex, JJ., suggests. I think that s. 526 was so framed as to bring the provisions of the Code into harmony with the language used by Sir James Colvile in the Privy Council case to which I have referred—*Chowdhry Murtaza Hossein* v. *Bichunnissa* (1).

In addition to the cases I have mentioned, I have the authority of Melvill, J., in *Dandekar* v. *Dandekars* (2), and, under these circumstances, after giving the case my best consideration, I feel bound to hold that Wilson and Pontifex, JJ., placed an incorrect interpretation upon s. 525, and one which those who framed never intended it to bear. I need scarcely point out the mischief which would arise if, when parties had agreed to refer matters to arbitration, and an award had been passed, the defeated party were entitled, when it was sought to make the award a rule of Court, to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. Something more than this was, I think, intended by the Legislature, and so it seems to me common sense should require. What I consider is required, is that such party should, by argument or evidence, or both, show substantial materials to warrant the Court in arriving at a conclusion that the reasons referred to in s. 520 or s. 521 exist in the particular case.

For these reasons, I am of opinion that both preliminary objections fail, and it will now be necessary to determine what the other issues in the matter ought to be.

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(1) L. R., 3 Ind. Ap. 209 (2) I. L. R., 6 Bom. 663.

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FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood

AJUDHIA PRASAD AND OTHERS (PLAINTIFFS) *v.* BALMUKAND AND OTHERS (DEFENDANTS) *

Appeal—Ex-parte decree—Civil Procedure Code, ss. 103, 108, 540, 560, 584—*Construction of statute—General words.*

Held by the Full Bench (STRAIGHT, Offg. C. J., and TYRRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex-parte*, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal. *Ramjas* v *Baijnath* (1) approved.

Per OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of the Code. *Lal Singh* v. *Kunjan* (2) and *Ramshet Bachaset* v. *Balkishna Ababhat* (3) referred to.

Per MAHMOOD, J — The distinction is one of detail merely and not of principle. *Lal Singh* v *Kunjan* (2) dissented from. *Zain-ul ab-din Khan* v *Ahmad Raza Khan* (4), *Jamaitunnissa* v. *Lutfunnissa* (5), *Ashruffunnissa* v. *Lehareaux* (6), *Luchmidas Vithaldas* v. *Ebrahim Oosman* (7), *Anantharama* v. *Madhava Paniker* (8), and *Modalatha's case* (9) referred to.

Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other.

THIS was a reference to the Full Bench by Brodhurst and Tyrrell, JJ. The facts and the point of law referred are stated in the order of reference which was as follows:—

"This was a suit brought by the holders of a hundi against Ajudhia Prasad and Juala Prasad, the drawers, and Fateh Lal, said to represent the firm of Baldeo Das, drawee of the same. In the Court of the Munsif, Juala Prasad, who has failed in business, confessed judgment.

* Second Appeal No. 558 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 24th January, 1885, modifying a decree of Pandit Bunsidhar, Munsif of Shâhjahânpur, dated the 24th November, 1884.

(1) I. L. R., 2 All., 567.
(2) I. L. R., 4 All., 387.
(3) 6 Bom. H. C. Rep., 161.
(4) I. L. R., 2 All 67; L. R., 5 Ind. Ap. 233.
(5) I. L. R., 7 All. 606.
(6) I. L. R., 8 Calc. 272.
(7) I. L. R., 2 Bom. 644.
(8) I. L. R., 3 Mad. 264.
(9) I. L. R., 2 Mad. 75.

Ajudhia Prasad denied that his son, Juala Prasad, had power to sign the hundi for him, and Fateh Lal made no appearance in the suit.

The Munsif gave the plaintiffs a decree against the confessing defendant, Juala Prasad, accepted the defence of non-responsibility set up by Ajudhia Prasad, and, on what materials we know not, dismissed the claim against Fateh Lal also. The latter had made no defence to the suit, had of course produced no evidence, and his interest in the matter does not seem to have been brought into issue. Under this decision, the plaintiffs held a decree against Juala Prasad alone, their suit standing dismissed against Ajudhia Prasad and Fateh Lal. The plaintiffs appealed to the District Court against this exemption of Ajudhia Prasad and Fateh Lal, and again Fateh Lal made no appearance in the appeal, but judgment was given by the lower appellate Court against him on the merits *ex-parte*, as well as against the other respondent, Ajudhia Prasad, who defended the appeal. Now all these defendants—Fateh Lal, Ajudhia Prasad and Juala Prasad—have brought this second appeal.

A preliminary objection is taken for the respondents, that Fateh Lal, against whom the lower Court gave judgment *ex-parte*, cannot maintain a second appeal against that judgment, but is restricted to his remedy as specially provided by s. 560 of the Code.

It has been ruled by a Bench of this Court in *Ramjas* v. *Baijnath* (1), that a second appeal would lie; but as one of the learned Judges, who was a party to that decision, subsequently held in Full Bench that a first appeal is not open to a defendant against an *ex-parte* judgment under s. 108, Civil Procedure Code, and one of us has doubts with regard to the ruling under s. 560, Civil Procedure Code, we think it well to refer this question in the first instance, and also the decision of the appeal, to a Full Bench. We make order accordingly."

Pandit *Bishambar Nath*, for the respondents. Fateh Lal cannot appeal from the *ex-parte* appellate decree made against him. He should have applied under s. 560 of the Civil Procedure Code for the re-hearing of the appeal. The ruling of the Full Bench in

(1) I. L. R., 2 All 567.

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Lal Singh v. *Kunjan* (1) is in point. In that case the word "may" in s 108 has been construed to mean "shall," and the word "may" is also used in s. 560.

Mr. *Amir-ud-din*, for the appellant Fateh Lal. The case of *Lal Singh* v. *Kunjan* (1) is not in point. That related to an *ex-parte* decree of a Court of first instance and not of an appellate Court. S. 584 does not provide that there shall be no appeal in such a case, nor is there anywhere in the Code a provision against an appeal in such a case.

OLDFIELD, J.—The question referred to us has arisen in a suit which Balmukand and others, plaintiffs, brought against Fateh Lal and others, on a hundi The suit was decreed in the first Court against one of the drawers, but dismissed against Fateh Lal, the drawee, and one of the drawers. The plaintiffs appealed, and the first appellate Court gave judgment *ex-parte* against Fateh Lal. He instituted a second appeal in the High Court, and the question referred is, whether a second appeal will lie on the part of Fateh Lal, a respondent against whom a judgment has been given by the first appellate Court *ex-parte*, inasmuch as s 560 of the Civil Procedure Code gave him another remedy by applying for a re-hearing of the appeal by the first appellate Court.

It has been ruled by a majority of the Full Bench of this Court that a defendant against whom a decree has been passed *ex-parte* by a Court of first instance cannot appeal, but is confined to the remedy provided in s. 108, by applying to have an order to set aside the *ex parte* decree—*Lal Singh* v. *Kunjan* (1). I was one of the Judges who dissented from the view held by the majority, and I was of opinion that the remedy by appeal is not taken away by reason of a procedure being provided by application for setting aside the *ex-parte* decree, and I am still of the same opinion for the reasons which I gave in that case.

I should, however, consider myself bound to follow the ruling in that case, if applicable to the case before us; but I think there is a distinction between the provisions in s. 108 and s. 560. In the latter the respondent would appear to have no right to insist upon

(1) I. L. R., 4 All. 387.

a re-hearing of the appeal, even when he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing; for the section provides that in that case "the Court *may* re-hear the appeal," thus allowing it a discretion to re-hear it or not. If this is so, the right of appeal cannot be taken away.

There is also a distinction between the case of a respondent who has succeeded in the first Court, and against whom a decree has been given *ex-parte* by the appellate Court, and the case of a defendant who sets up no defence and produces no evidence in the first Court. This distinction was pointed out in *Ramshet Bachaset* v. *Balkishna Ababhat* (1), and also by Sir R. Stuart, Chief Justice of this Court, in the Full Bench case of *Lal Singh* v. *Kunjan* (2), who while he concurred in holding that under s. 108 of the Civil Procedure Code, a defendant against whom a decree was passed *ex-parte* could not appeal, drew a distinction between this case and that of a respondent against whom a decree has been given *ex-parte* by an appellate Court, who, he held, would still have his remedy by appeal, notwithstanding that he might apply for a re-hearing under s. 560; and this was the effect of the ruling by a Division Bench of this Court in the case of *Ramjas* v. *Barjnath* (3).

I would reply to the reference that a respondent against whom judgment is given by an appellate Court *ex-parte* is not deprived of his right of second appeal by reason of anything in s. 560 of the Civil Procedure Code, which permits him to apply to the appellate Court for a re-hearing of the appeal, and return the case to the Division Bench for disposal.

BRODHURST, J.—A second appeal will, in my opinion, lie from an *ex-parte* decree of a lower appellate Court. In my judgment in *Lal Singh* v. *Kunjan* (2), I have given my reasons for holding that an appeal will lie by a defendant from a decree passed *ex-parte* under the provisions of Chapter VII of the Civil Procedure Code, and the opinions I have expressed are in accordance with judgments of one or more Benches of every High Court in India.

On the analogous question now referred, I think it sufficient to say that I concur in the judgments of Stuart, C. J., and Spankie, J.,

(1) 6 Bom. H. C. Rep. 161. (2) I. L. R., 4 All. 337.
(3) I. L. R., 2 All. 567.

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in *Ramjas* v. *Baijnath* (1), and in which those learned Judges ruled that an appeal will lie from an *ex-parte* decree of a lower appellate Court.

MAHMOOD, J.—I have arrived at the same conclusions as my learned brothers Oldfield and Brodhurst, but as at the hearing of the appeal the case appeared to me somewhat distinguishable from that decided by the majority of the Full Bench in *Lal Singh* v. *Kunjan* (2), I think it necessary to state my reasons fully, with the object of showing that now I hold that no real distinction in principle exists. What was ruled in that case was this, that because by s. 108 of the Civil Procedure Code there is provided a special procedure for the case of non-appearance by a defendant against whom a decree is passed, therefore the general provisions of s. 540, conferring the right of appeal, do not apply to such a case. My own view is that the right of appeal being a special remedy, apart from the ordinary application of the maxim *ubi jus ibi remedium*, can only be created by specific enactment. In this country, with regard to appeals, no rule of the common law exists, but there is a specific provision in the Civil Procedure Code. When I say that the right of appeal must be expressly granted by statute, I think I am within the authority of cases decided by the highest tribunals in England.

The question therefore is whether the appellant Fateh Lal could have maintained an appeal to the lower appellate Court. This is not the specific question to which this reference relates, but the answer to it must in principle be the same as the answer to the question which has been referred to the Full Bench. In the present case the plaintiff sued certain persons—Fateh Lal, Ajudhia Prasad, and Juala Prasad. Among these defendants Juala Prasad admitted the claim. Ajudhia Prasad said that he could not be held liable in law to the claim. Fateh Lal did not appear at all. The Munsif's decree was, that the claim, as against Juala Prasad, should be decreed because it was admitted; that as against Ajudhia Prasad it should be dismissed, because he had succeeded in proving his non-liability; and with regard to Fateh Lal, that it should be dismissed for reasons that do not clearly

(1) I. L. R., 2 All. 567. (2) I. L. R., 4 All. 387.

appear. The plaintiff appealed to the Judge from that portion of the Munsif's decree which exempted Ajudhia Prasad and Fateh Lal from liability, and the District Judge heard the appeal in the presence of Ajudhia Prasad, and *ex-parte* so far as concerned Fateh Lal; but in consequence of the view which the learned Judge took of the law, he passed a decree against both. In the present case Ajudhia Prasad and Fateh Lal have joined with Juala Prasad in appealing to this Court against the whole of the Judge's decree, and this has given rise to the present reference.

It is an admitted proposition relating to the construction of statutes, that whenever the common law is varied by statute, it is one of the elements of what has been called "*the golden rule*" of construction, that, in case of any difficulty arising, the Court will look to the common law to see how it stood before it was altered by the Legislature; and, in giving effect to the new law, will place a beneficial construction so as to "suppress the mischief and advance the remedy," the mischief being mainly indicated by what has been repealed or abolished. This was laid down by Lord Coke in *Heydon's Case*, and has ever since, I believe, been acted upon by the Courts in England. In this country, I believe, it is not going too far to say that, just as a Court is bound to take notice of alterations of the common law effected by statute, so also, for similar reasons, it is bound to take notice of changes of the law by statutes which alter the specific provisions of earlier enactments *in pari materia*. Under the old Code, Act VIII of 1859, such matters were dealt with by s. 119. That section began with the following words:—"No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance." This clearly shows that decrees of this kind were not, under the Code of 1859, open to appeal. This provision stood when Act XXIII of 1861 was passed. That Act dealt with the question of appeal; and in a section (s. 23) substituted for s. 332 of the old Code, we find these words:—"Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisons of those Courts." So that under

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Act XXIII of 1861, the law stood that, by an express provision, *ex-parte* decrees were not open to appeal.

But it must be remembered that, even under that law, the Lords of the Privy Council in *Zain-ul-ab-din Khan* v. *Ahmad Raza Khan* (1) placed a very strict construction upon s. 119 of the old Code upon the ground that "a defendant ought not to be deprived of the right of appeal, except by express words or necesary implication;" and they held that a defendant who had once appeared was excluded from the prohibition, and could appeal, even though the case was heard in his absence, and a decree was passed against him *ex-parte*. Then came Act X of 1877, in which the first sentence of s. 119 (already quoted) of the old Code was omitted. In ss. 103 and 108 of that Act, it was *not* laid down as in the former Act that decrees of this kind were not appealable. Moreover, if it had been intended to maintain the former rule restricting the right of appeal, s. 540 of the new Act—which was word for word the same as s. 540 of the present Code—should have contained a proviso that the right of appeal should not exist where the plaintiff failed to appear, and the suit was dismissed on that ground; or where, in consequence of the defendant's failure to appear and set up a defence, the suit was decreed. S. 540, however, contained no such proviso. It was expressed in the following terms:—"Unless, when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal *shall* lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction, to the Courts authorised to hear appeals from the decisions of those Courts." I need say nothing as to the word "*shall*," but I must here point out that the section does not say "expressly provided *for*", but only "expressly provided,"—two phrases which, as I understand the English language, mean two different things, and the difference of meaning is in favour of the opinion which I shall presently express. In the present case there can be no doubt that the Judge was authorised to hear the appeal; and the question is, whether the word "*decree*" in s. 540 means to exclude the *ex-parte* decrees contemplated by s. 108. I take it to be an undoubted proposition of law that, in the interpretation of general words in a

(1) I. L. R., 2 All., 67, L. R., 5 Ind. Ap., 233.

statute, the Courts are bound to give those words the broadest possible effect, unless there is some specific reason for limiting their meaning. Further, there can be no doubt that if those words operate in derogation of the rights of the subject, the strictest interpretation must be placed upon them ; and by analogy to the rule of criminal law that an accused person is entitled to the benefit of every doubt, every ambiguity (if any) must be construed in favour of the subject. The question then is, what reason is there for holding that the word "*decree*" in s. 540 means only decrees passed in contested suits ? I see no reason for so holding The only argument is that, in another part of the Code, s. 108, the Legislature has provided one form of procedure for setting aside *ex-parte* decrees ; but I have already said that "provided" as used in s. 540 must not be read as if meant that the contingency is "provided *for*." Then the question is, where two procedures or two remedies have been provided, can one of them be taken as operating in derogation of the other ? Of course, where a statute itself creates a substantive right, obligation, or duty, and, as it were in the same breath, provides a special and exclusive remedy, such remedy would be the only one available for that purpose (Maxwell on the Interpretation of Statutes, pp. 495-500). But those principles are not applicable to the enactment now under consideration, and, as I observed during the argument, I see no more reason for holding that the right of appeal conferred by s 540 is subject to the provisions of s 108, than for holding that s. 108 must be read subject to the provisions of s. 540. Again, it must be remembered that a statute, though the expression of the will of the Legislature, is after all a document, and must be interpreted according to the broad and fundamental principles applicable to the construction of documents in general. This being so, I am within the authorities when I say that, in the construction of documents, a later covenant or provision governs those preceding it, on the theory that the later clause represents the later intention ; but the preceding covenants or provisions never govern the subsequent ones; and it is also a rule that every attempt should be made to avoid inconsistency of meaning. These rules, however, are applicable only in cases of real conflict ; but with due deference to the majority of the Full Bench in *Lal Singh* v. *Kanjan* (1),

(1) I. L. R., 4 All. 387.

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no such conflict exists, for, as I shall presently show, s. 108 and s. 540 aim at two different ends. S. 108 says that the defendant against whom an *ex-parte* decree has been passed, "*may*" apply to the Court which has passed it to set it aside for certain specific reasons. It gives a choice to the party aggrieved, and does not compel him to adopt the remedy which it provides, or make other remedies impossible. If there is no conflict between the two rules, s. 540 obviously enables, not only a defendant, but a plaintiff, who does not appear, to appeal under the general provisions relating to appeals. In the case of the plaintiff's default, it is said that one who has taken no care to prosecute his claim in the Court of first instance, should not be allowed to appeal in the same way as if he had taken all proper care. There appears to me to be nothing in this argument, because, supposing that the plaintiff does not appear, and the defendant does appear, the Court is bound to give the latter a decree, unless he admits the claim or part thereof; while, supposing the plaintiff does not appear, because he, in good faith, expects the defendant to be honest enough to admit the claim, and supposing the Court, in violation of the rule contained in s. 102 of the Code, which, in these circumstances, imperatively requires it to decree so much of the claim as is admitted, dismisses the suit *in toto*, in such a case the plaintiff, even though in default, would be entitled to appeal. It has never been contended in such circumstances that when a suit has been taken up in the absence of the plaintiff, and the Court, instead of decreeing the suit, dismisses it, the plaintiff could not appeal under the provisions of s. 540. It follows that, to this extent at all events, decrees passed in the absence of one of the parties are among the decrees to which s. 540 relates. What reason, then, is there for holding that a defendant who is in default has not the same right?

I have already said that the mere granting of one form of remedy cannot be regarded as taking away another. If we applied a different rule, it might be said that because s. 523 or s. 525 as to arbitration provides one form of remedy, therefore in those cases the ordinary remedy by a regular suit is barred; or that because s. 623 gives the power to apply for a review of judgment, the party entitled to make such application is thereby deprived of his right of appeal. I believe that the latest authorities on the

subject in England justify the proposition that anything, broadly speaking, which may be made the subject of an application for a new trial, may also be made the subject of appeal under the Judicature Acts; and I do not think our own law is radically different on this point.

For these reasons I am of opinion that s. 540 applies to *ex-parte* decrees, by which a suit is either decreed or dismissed, and enables a defaulting plaintiff to come up in appeal; and he would succeed if he showed that the Court below should not have dismissed his suit. It appears to me that there is no reason to regard s. 540 as limited in its scope to decrees passed in contested suits only. And if this is so, a defendant against whom a decree is passed *ex-parte* would, *à fortiori*, have a right of appeal. Nor is the reason far to seek. He may satisfy the appellate Court that upon the case as presented by the plaintiff himself in the plaint or upon the evidence as produced by him, the suit should not have been decreed, either because it was barred by some positive rule of law, (such as limitation, *res-judicata, &c*), or because the plaintiff's own evidence contradicted the case set up by him. And I must add that this view does not imply that, in the absence of adequate materials on the record, the appellate Court would be bound to entertain any such grounds for setting aside the lower Court's decree as are contemplated by s. 108 of the Code. Ordinarily an appellant is confined to the facts and materials upon the record.

The truth is that s. 560 of the Code is a reproduction, *mutatis mutandis*, of the rule stated in s. 108 in the earlier part of the Code with reference to suits. The section provides that "when an appeal is heard *ex-parte*, in the absence of the respondent, and judgment is given against him, he may apply to the appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him." This is exactly the same rule as is stated in s. 108, though I also feel that much might be said upon the distinction between the words "may" and "shall" which my brother Oldfield has pointed out. And I

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may add that s. 560 of the Code is only a further illustration of the dissentient opinion which I expressed in *Jamaitunnissa* v. *Lutfunnissa* (1) in interpreting s. 582, that the Code throughout preserves the analogy, *ad litis ordinationem*, between the defendant in a suit and the respondent in an appeal. S. 584 of the Code, relating to the ground upon which second appeals may be preferred, is analogous in its provisions to s. 540, and the expression used in both sections is "unless when otherwise *provided by* by this Code," and the expression "otherwise *provided for*" is not adopted. And to what I have already said upon the point I may add that the distinction is a very wide one. The word "*for*" would imply that a remedy was elsewhere provided to meet the contingency; the word "*by*" without the word "*for*" means that the statute itself says there shall be no appeal. Again, s. 522 provides that where a decree has been passed on an arbitration award, and is co-extensive therewith, "no appeal shall lie." This is an illustration of what the Legislature means by the words "provided by" in ss 540 and 584. Then again, another illustration is to be found in s. 586, which provides that "no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes," where the value is less than Rs. 500. So that there it is "otherwise provided by" the Code, that no appeal is to lie. There is no corresponding provision laying down that no appeal shall lie from an *ex-parte* decree.

With reference to the case-law on the subject, I may refer to *Ashruffunnissa* v. *Lehareaux* (2), *Luckmidas Vithaldas* v. *Ebrahim Oosman* (3) and *Anantharama* v. *Madhava Paniker* (4), which all support my view. There is also a ruling of this Court in *Ramjas* v. *Baijnath* (5), and another of the Madras Court in *Modalatha's case* (6), laying down the rule that, in second appeals, at all events, an appeal will lie from an *ex-parte* decree of the lower appellate Court. Further, even under the old law, there is a case—*Ramshet Bachaset* v. *Balkrishna Ababhat* (7)—in which a distinguished Judge, Couch, C. J., draws a marked distinction between the case of a defendant and that of a respondent not appearing. I accept

(1) I. L. R., 7 All. 606.
(2) I. L. R., 8 Calc. 272.
(3) I. L. R., 2 Bom 644.
(4) I. L. R., 3 Mad. 264.
(5) I. L. R., 2 All. 567.
(6) I. L. R., 2 Mad. 75.
(7) 6 Bom. H. C. Rep. 161.

this distinction, but it is in my humble opinion one of detail only, and not of juridical principle as representing a fundamental doctrine.

For these reasons I hold that our answer to the question referred must be that a second appeal lies, under s. 584 of the Code, from a decree of the lower appellate Court passed in the absence of the respondent, whether the respondent were plaintiff or defendant in the suit.

STRAIGHT, Offg. C. J., and TYRRELL, J.—Upon consideration of the question referred to the Full Bench, we are of opinion that, as an amendment of the law on this subject is in contemplation by the Legislature, and will in all probability be shortly carried into effect, any remarks by us on the present occasion would, under the circumstances, be undesirable.

APPELLATE CIVIL.

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May 12.

Before Mr Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

SANT KUMAR, MINOR, BY HIS GUARDIAN, SUKH NIDHAN (PLAINTIFF) *v.* DEO SARAN AND OTHERS (DEFENDANTS) *

Hindu Law—Daughter's son—Hindu widow—Decree against widow—Reversioner—Res judicata—Declaratory decree—Act I of 1877 (*Specific Relief Act*), *s.* 42—*Civil Procedure Code, s.* 578.

A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K*'s death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M*'s son, who had been born after *K*'s compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu Law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to

* Second Appeal No. 1279 of 1885, from a decree of Maulvi Muhammad Ahmad-ul lah Khan, Subordinate Judge of Gorakhpur, dated the 18th May, 1885, reversing a decree of Maulvi Aziz ul Rahman, Munsif of Bansgaon, dated the 5th January, 1885.

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possession on *M's* death. The lower appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

Per MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose* v. *Rajoneekant Mitter* (1), *Sibta* v. *Badri Prasad* (2), and *Baijnath* v. *Mahabir* (3) referred to.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res-judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bonâ fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anund Koer* v. *The Court of Wards* (4), *Nand Kumar* v. *Radha Kuari* (5), and *Katama Natchiar's case* (6) referred to

Also that *M's* withdrawal of her suit was not a bar to the suit of the plaintiff.

Also that it could not be said that a daughter's son was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code.

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner

(1) 15 B. L. R., 10; L. R., 2 Ind. Ap. 113.
(2) I. L. R., 3 All. 134.
(3) I. L. R., 1 All. 608.
(4) I. L. R., 6 Calc. 764; L. R., 8 Ind. Ap. 14.
(5) I. L. R., 1 All. 282.
(6) 9 Moo. I. A. 543.

grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere.

Ram Kanaye Chuckerbutty v. *Prosunno Coomar Sein* (1), *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (2), *Sheo Singh Rai* v. *Dakho* (3) and *Damoodur Surmah* v. *Mohee Kant Surmah* (4), referred to

THE facts of this case were as follows:—One Ram Fakir had two brothers, Hanuman and Sheo Parshan, represented in this case by their sons. The plaintiff was the son of Mohra, daughter of Ram Fakir, who died many years ago, leaving also a widow, Kadma. Upon the death of Ram Fakir, Kadma, his widow, obtained possession of his zamindari property, a 1 anna and 4 pies share in each of three villages, on the allegation that her deceased husband, having been separated from his brothers, and having died without leaving a son, she was entitled to succeed to his estate according to the Hindu law. After this, about the year 1865, probably soon after Ram Fakir's death, the sons of Hanuman and Sheo Parshan instituted a suit against Kadmo for possession of the estate of Ram Fakir, and that litigation ended in a compromise, which the widow entered into with them on the 8th November, 1865. Under the terms of this compromise the widow recognized their rights, and conceded that, the family of Ram Fakir being joint, her right in his estate was limited to receiving maintenance for life only. At that time Sant Kumar, the plaintiff in the present case, had not been born. Kadma having died, Mohra, the mother of the plaintiff, instituted a suit on her own behalf for her father's estate, against the sons of Hanuman and Sheo Parshan, about the year 1880, but subsequently withdrew her claim on the 5th November, 1880, apparently without reserving any right to sue again.

The present suit was instituted by the plaintiff Sant Kumar as a minor, through his guardian, on the 1st December, 1884, against Mohra and the sons of Hanuman and Sheo Parshan, and its object was to recover possession of the estate of Ram Fakir, which was in the possession of the sons of Hanuman and Sheo Parshan, who were the principal defendants, on the allegation that, the family being divided, he was entitled, under the Hindu law, to succeed to such estate, and that the compromise of the 8th Nov-

(1) 13 W. R. 175.
(2) 11 B. L. R. 203; L. R., Ind. Ap., Sup. Vol., 165.
(3) I. L. R., 1 All. 688; L. R., 6 Ind. Ap. 87.
(4) 21 W. R. 54.

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ember, 1865, entered into by Kadma, and the withdrawal of the former suit by Mohra, were both in fraud of the plaintiff's succession, and were not binding upon him.

The suit was resisted by the principal defendants mainly upon the ground that Ram Fakir was a member of a joint Hindu family; that his widow, Kadma, was therefore entitled only to maintenance; that the compromise entered into by her before the plaintiff's birth was *bonâ fide*, as also the withdrawal of her claim by the plaintiff's mother, Mohra; that plaintiff was neither entitled to set aside those proceedings, nor had he any right to sue for possession in the lifetime of his mother Mohra; and that the suit was barred by the rule of *res-judicata*, the plaintiff's *status* being that of a legal representative of Kadma through Mohra. All these pleas were disallowed by the Court of first instance which found, *inter alia*, that Ram Fakir was separate in estate from his brothers; that the plaintiff was, therefore, entitled to succeed to the share of his maternal grandfather; that the proceedings taken by Kadma and Mohra could not prejudice his rights; but that the mother of the plaintiff being still alive, he was entitled to possession only upon her death. Upon these findings the Court of first instance gave a decree to the plaintiff declaring his right to obtain possession of the property upon the death of his mother Musammat Mohra.

Upon appeal the lower appellate Court, having regard to the case of *Nand Kumar* v. *Radha Kuari* (1), reversed the decree of the first Court on the ground that, Kadma's compromise of the 8th November, 1865, was conclusive and binding upon the plaintiff, and also on the ground that, the plaintiff's mother being still alive, the plaintiff had no *locus standi* to maintain the suit. For this latter proposition the lower appellate Court relied upon *Baijnath* v. *Mahabir* (2).

The plaintiff appealed to the High Court.

Babu *Sital Prasad Chattarji*, for the appellant.

Pandit *Ajudhia Nath* and Shah *Asad Ali*, for the respondents.

MAHMOOD, J.—In my opinion the first question to be considered in this case is, whether, upon the facts as stated by plaintiff

(1) I. L. R., 1 All. 282. (2) I. L. R., 1 All. 608.

himself, he has any *locus standi* to maintain the suit. The general rule of Hindu law is, that a daughter's son can never succeed to the estate of his grandfather so long as there is in existence any daughter who is entitled to take, either as heir or by survivorship to her other sisters. This is the effect of the ruling of the Lords of the Privy Council in *Aumirtolal Bose* v. *Rajoneekant Mitter* (1) and also of the other cases cited by Mr. Mayne in his excellent work on Hindu Law and Usage, s. 478. In s. 479 of the same work the learned author, upon the authority of the ruling of this Court in *Sibta* v. *Badri Prasad* (2), goes on to say that, according to the Mitakshara law, a daughter's son takes his maternal grandfather's estate as full proprietor; on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather, but that until the death of the last daughter capable of being an heiress, he takes no interest whatever, and can transmit none, and therefore if he should die before the last of such daughters leaving a son, that son would not succeed because he belongs to a completely different family, and he would offer no oblation to the maternal grandfather of his own father. These I take to be the undoubted propositions of the Mitakshara school of Hindu law, and fully consistent with the rule laid down by this Court in *Baijnath* v. *Mahabir* (3) so far as that case follows the ruling of the Privy Council above referred to. In short, a daughter's son—to use the words of Mr. Mayne—"takes not as heir to any daughter who may have died, but as heir to his own grandfather, and, of course, cannot take at all so long as there is a nearer heir in existence." I do not understand any of the rulings to which I have referred to lay down any rule which goes beyond saying that, during the existence of any daughters, the daughter's son cannot succeed to—that is to say, obtain proprietary possession of—his maternal grandfather's estate in a divided Hindu family; and it seems to me equally clear that, whenever, according to the rule of succession, the daughter's son does succeed to his maternal grandfather's estate, he succeeds as "full owner" in the sense in which that expression is understood in Hindu law. Now, this being so, I hold that during the lifetime of a daughter, the position of the daughter's son, with reference to his maternal grandfather's divided estate, is, at least by a close analogy, similar

(1) 15 B. L. R. 10; L. R., 2 Ind. Ap. 113.
(2) I. L. R., 3 All. 134.
(3) I. L. R., 1 All. 603.

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to the *status* of such reversioners as trace their descent through the main line to the full owner. This is a conclusion which I think is borne out by the learned summary of the historical aspect of the rights of a daughter's son given by Mr. Mayne in s. 477 of his work: and I may add that the circumstance of the daughter's son being born *after* the death of his maternal grandfather, would have no effect upon his rights in a case such as the present. But it is of course clear that those rights do not entitle him under ordinary circumstances to succeed to the maternal grandfather's estate during the existence of a daughter, whether she be his own mother or maternal aunt. The claim for possession in this case was, therefore, rightly dismissed by the Munsif, but the question remains whether the declaratory decree, which he awarded to the plaintiff, was rightly interfered with by the lower appellate Court.

Upon this last question the nature of the plaint has to be considered, and after having read the pleadings in the case, I am of opinion that the prayer in the plaint is expressly and clearly wide enough to include a prayer for declaratory relief. This being so, the next point is, whether the plaint discloses any such circumstances as would entitle the plaintiff to ask for a decree such as the Munsif has given him. Questions of this kind formerly arose under the somewhat indefinite provisions of s. 15 of the old Civil Procedure Code (Act VIII of 1859), and numerous rulings are to be found in the reports as to the exact scope of declaratory relief. The matter is now governed by the provisions of s. 42 of the Specific Relief Act (I of 1877), and I have before now, in the case of *Balgobind* v. *Ram Kumar* (1), had occasion to express the manner in which I interpret that section in its application to declaratory suits by Hindu reversioners. According to those views, and with reference to the ruling of their Lordships of the Privy Council in *Rani Anund Koer* v. *The Court of Wards* (2), it seems to me that the present is a case in which, if the facts alleged by the plaintiff are true, he can maintain the suit. It is perfectly true, as was held by this Court in *Nand Kumar* v. *Radha Kuari* (3), that where, on her husband's death, a Hindu widow obtains possession of his estate as his heir, in a suit against her for possession thereof

(1) I. L. R., 6 All. 431. (2) I. L. R., 6 Calc. 764; L. R., 8 Ind. Ap. 14.
(3) I. L. R., 1 All. 282.

by certain persons claiming to succeed to the estate as rightful heirs, a decree obtained by them would be a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow ; in other words, such a decree would operate as *res-judicata* against all who, in the order of succession, came after the widow, and in that sense may be dealt with as her representatives. But the peculiar nature of the "widow's estate" under the Hindu law is such that her position in litigation must necessarily be subjected to the qualification which the ruling which I have just cited imposes upon the operation of such a plea in bar of the action, namely, that the decree should have been fairly obtained against the widow in a *bonâ fide* litigation. This seems to me to be perfectly clear from the ruling of the Privy Council in the case of *Katama Natchiar* (1) where their Lordships made the following observations at p. 608 of the report :—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchiar's* lifetime, would have bound those claiming the zemindari in succession to her. And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or in other words, unless that decree could have been successfully impeached on some special ground—it would have been an effectual bar to any new suit in the zila Court by any person claiming in succession to *Anga Mootoo Natchiar*. For, assuming her to be entitled to the zemindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

(1) 9 Moo. I. A. 543.

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Now, in the present case, the compromise which the principal defendants obtained from Musammat Kadma on the 8th November, 1865, was an arrangement which can scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. At any rate, the compromise, whether it was made by a rule of Court or not, cannot, in my opinion, be dealt with as having the full force of a decree which would be the result of adjudication in a contested suit. Moreover, the plaintiff distinctly alleges in the plaint that the transaction of the compromise was not *bonâ fide*, and that it had not been fairly obtained. The question was therefore clearly in issue, and whilst the Court of first instance took a view favourable to the plaintiff's case, the lower appellate Court has failed to enter into the merits of it, apparently under the view that the *bonâ fides* of the compromise was a matter of no significance at all.

Almost the same remarks, *mutatis mutandis*, are applicable to the manner in which the lower appellate Court has dealt with the position of Musammat Mohra and her action in withdrawing the suit which she had instituted against the principal defendants. It is admitted that the object of that suit was to recover possession of the property now in suit, on the ground that it formed the separate property of Ram Fakir, and devolved upon her upon the death of her mother Musammat Kadma, which is said to have taken place in Asarh 1286 fasli (1879). The suit was not adjudicated upon but ended in being withdrawn on the 5th November, 1880, under circumstances which the plaintiff distinctly alleges were tainted with fraud and collusion. Upon this point also the Munsif took a view favourable to the plaintiff, but the lower Court has failed to go into the merits of the question because it held that the very existence of Musammat Mohra constituted a full answer to the present suit, as it deprived the plaintiff of *locus standi*. For this view the learned Subordinate Judge has relied upon the ruling of this Court in *Baijnath* v. *Mahabir* (1). Having carefully considered the report of that case, I am of opinion that it is not on all fours with the present case. The main proposition of law there laid down is undoubted; but there is nothing in the judgment deliver-

(1) I. L. R., 1 All. 608.

ed by the learned Judges in that case to show that a daughter's son is not under any condition competent to maintain a declaratory suit of this nature during the lifetime of the mother or maternal aunt in respect of his maternal grandfather's property, to the full ownership of which he has a reversionary right. The awarding of declaratory relief is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff. The discretion is now regulated by s. 42 of the Specific Relief Act, and I have already said enough to indicate that, if the allegations of the plaintiff are true, a suit of this nature, so far as it prays for declaratory relief, would be maintainable : and I wish to take this opportunity of expressing a view which I have long entertained in connection with the power of interference which the appellate Court should exercise in cases where it is doubtful whether the circumstances fully justified a declaratory decree. The awarding of specific relief belongs to one of those branches of law, regarding which even the great jurists are not unanimous as to whether it falls within the province of procedure, *ad litis ordinationem*, or appertains to the region of substantive law, *ad litis decisionem*. Perhaps the simplest and safest view is to regard the subject as occupying a middle place between these two great divisions of law. But whether the awarding of declaratory decrees is a rule of procedure or a rule of substantive law, it seems to me that it does not occupy such a position in the juristic arrangement of legal rules as would vitiate decrees awarded in cases where its application may be doubtful. I may here observe that the Legislature, in framing the rule in s. 42 of the Specific Relief Act, has dealt with the matter as purely discretionary with the Court, and it is noticeable that the only restriction to which the discretionary power is made subject by the express letter of the statute, is contained in the proviso to that section, which lays down "that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." Beyond this restriction, no other limitation is imposed by the Legislature, though it may well be taken for granted, and it goes without saying, that the Legislature did not intend the discretionary power

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to be exercised in an unsound manner. The absence of any other restriction in s. 42 is all the more significant when we find that the same enactment, in laying down the rule as to a cognate branch of specific relief, and in leaving it to the discretion of the Court to decree specific performance of contracts, has framed s. 22 in language which expressly provides restrictions upon the power. For the latter section, after giving the power, goes on to say that "the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal." Then the section goes on further, and, in two carefully-framed clauses, indicates the class of "cases in which the Court may properly exercise a discretion *not* to decree specific performance;" and again in another clause indications are given of the intentions of the Legislature as to the nature of cases in which Courts may award such relief. There are, of course, further provisions in the following few sections regulating the awarding of specific performance. Now, no such rules, or elaborate indications, of restrictions are to found in the Act with reference to declaratory decrees. And I have said all this in order to answer the question whether, in a case such as the present, and granting that the plaintiff had *locus standi* to maintain the suit, and that the decree of the Court of first instance was sound upon the merits, the lower appellate Court would have been justified in reversing the decree simply upon the ground that the discretionary relief was improperly exercised in the affirmative by the Munsif.

I am of opinion that the question must be answered in the negative, and I hold that, so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, so long as that Court entering into the merits of the plaintiff's case arrives at right conclusions, and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised. I know that in saying this I am laying down a strong proposition of law, and I am anxious to justify it further by the statutory provisions themselves. I have already shown that whilst the discretion to decree specific performance of contracts is expressly declared to be "capable of correction by a Court of appeal," no such provision exists in the Specific Relief Act as to declaratory decrees. I will say nothing as to the effect

of the word" *shall*" in the proviso to s. 42, because, even if the plaintiff's whole case be accepted, that proviso would not apply to this case—he not being entitled " to ask further relief than a mere declaration of title " within the meaning of the statute. Putting the proviso, therefore, out of the question, I hold that an improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an " error, defect, or irregularity, whether in the decision or in any order passed in the suit or otherwise, not affecting the merits of the case or the jurisdiction of the Court, " within the meaning of s. 578 of the Civil Procedure Code. That section contains one of the most salutary rules of law which the Code provides. The obvious aim of the clause, in keeping with many another provision in the Code, is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuity of litigation, which the old method of English Common Law Courts so much encouraged. And in applying the clause to declaratory decrees in the manner in which I have suggested, it seems to me that we should be only giving effect to the policy of the Legislature. For I fail to understand what possible harm can arise where *A*, being admittedly entitled to a right against *B*, goes to a Court of competent jurisdiction, and after a full trial of his cause obtains from that Court a declaration consistent with the actual merits of the dispute. Such a declaration may possibly have been improperly made, owing to the absence of sufficient reasons for awarding such a relief. But, after all, such a declaration, though irregular, only asserts a fact and confirms a right. The holder of such a decree obtains a conclusive evidence against his antagonist ; and if the decree is sound upon the merits, the ends of justice are promoted by the issues not being re-opened and re-tried at a later period, when, by the lapse of time, the muniments of title and the evidence of witnesses may have disappeared.

Nor is the view which I have taken wholly unsupported by the case-law. I am aware that there are cases to be found in the Reports (under s. 15 of the Code of 1859), which may not be wholly consistent with my opinion. But the law has since been newly formulated by the express interference of the Legislature; and it is clear that a great deal of what I have said proceeds upon

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the construction of s 42 of the Specific Relief Act. But apart from this, there is a judgment of that eminent Indian Judge, the late Mr. Justice Dwarkanath Mitter, in *Ram Kanaye Chuckerbutty* v. *Prosunno Coomar Sein* (1), where the learned Judge laid down the rule of law which seems to me to be best suited to the conditions of litigation in this country, and to be consonant with sound principles of procedure. Referring to s. 15 of Act VIII of 1859 (which corresponds with s. 42 of the Specific Relief Act), and s. 350 of the same Act, which has been replaced and practically reproduced in s. 578 of the present Code, the learned Judge went on to say :—" It is true that it is entirely in the discretion of the Court to make a declaratory decree under s. 15, Act VIII of 1859; but after this discretion has been already exercised by a Court of competent jurisdiction, it does not lie within the power of a Court of appeal to set aside the decree of the lower Court upon an objection like this, which does not affect the merits of that decree, and which was not even taken at the time when it was passed." Whilst accepting this enunciation of the law, I will guard myself against being understood to say that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. I will lay down no rule upon this subject because, as I have already shown, the point does not arise in the case. It is sufficient to say that in *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (2) the Lords of the Privy Council, referring to the discretionary power as to declaratory decrees, expressed the principle that where a Court " has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion." And I may further add, as supporting my view, that in the case of *Sheo Singh Rai* v. *Dakho* (3) the Lords of the Privy Council denominated the objections as to the impropriety of maintaining the declaratory suit, when raised in appeal, as " somewhat technical," and declined to entertain them. The present case seems to me to be similar to *Damoodur Surmah* v. *Mohee Kant Surmah* (4), and if the allegations of the plaintiff

(1) 13 W. R 175.
(2) 11 B. L. R. 203 , L. R., Ind. Ap., Sup. Vol , 165.
(3) I. L. R., 1 All. 688 ; L. R., 6 Ind. Ap 87.
(4) 21 W. R. 54.

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are substantiated, he can, in my opinion, maintain the suit, and reasonably claim declaratory relief But unfortunately the manner in which the lower appellate Court has viewed this case, has prevented it entirely from entering into the merits of the case, upon the issues of fact raised by the parties. The defendants went the length of denying that the plaintiff's mother, Musammat Mohra, was the daughter of Ram Fakir. They alleged that Ram Fakir was not divided from his brothers, whom the defendants represent. There were also minor allegations of facts upon which the parties did not agree, but none of these points have been considered or determined by the lower appellate Court, and there is not even a finding as to whether the family of Ram Fakir and his brothers was joint or divided,—a point which is of course all-important in this case.

Under these circumstances, I think it is impossible to dispose of this appeal finally here, and I would therefore decree this appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court, under s. 562 of the Civil Procedure Code, for disposal upon the merits, with reference to the observations aleady made. Costs to abide the result.

STRAIGHT, Offg. C. J.—I agree to the order proposed by my brother Mahmood.

Case remanded.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1886 *May* 21.

ABDUL HAYAI KHAN (PLAINTIFF) *v.* CHUNIA KUAR (DEFENDANT).*

Amendment of decree—Execution of decree—Objection to validity of amendment—Civil Procedure Code, s. 206.

The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the

* Second Appeal No 64 of 1885, from an order of W. T. Martin, Esq., Additional Judge of Aligarh, dated the 2nd April, 1885, affirming an order of Maulvi Sami-ullah, Subordinate Judge of Aligarh, dated the 22nd March, 1884.

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decree disallowed the objection, on the ground that it was not such as could be entertained in the execution department.

Held that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party, as required by s 206 of the Code.

Held also that when a decree holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed.

THE facts of this case were as follows:—In September, 1880, Chunia Kuar brought a suit against Abdul Hayai Khan on a bond, claiming Rs. 925, principal, and Rs. 1,116-13 interest,—total Rs. 2,041-13. The defendant pleaded payment in satisfaction of the bond-debt to the extent of Rs. 1,196-14. In support of this plea he produced two receipts, one dated the 13th May, 1877, and the other, covering Rs. 875, dated the 27th November, 1878. The plaintiff admitted the first receipt, but denied the genuineness of the second. The only issue which the Court framed was as to whether the second receipt was genuine or not. This issue it decided against the defendant; and, making a deduction of the amount covered by the first receipt, it gave the plaintiff a decree for Rs. 815-2, principal, and Rs. 467-3-6 interest,—total Rs. 1,282-5-6. The decree was dated the 8th February, 1881. On the 22nd March, 1881, the plaintiff applied to have the decree amended, alleging that the amounts, both of principal and interest, entered in the decree, were not correct amounts. She alleged that the principal should be Rs. 817-4-6 and the interest Rs. 643-9-6, —total Rs. 1,460-14. On the 14th May, 1881, without giving notice to the defendant, the Court ordered the decree to be amended as prayed. On the decree-holder applying for execution of the decree as amended, the judgment-debtor objected to the validity of the amendment. The Court executing the decree held that it was not competent to entertain the objection in the execution-department. On appeal by the judgment-debtor the lower appellate Court concurred in the view taken by the first Court, and further decided that "the amendment was owing to arithmetical errors in calculating interest, and the amendment was not contrary to the judgment."

The judgment-debtor appealed to the High Court The respondent not appearing, the appeal was heard *ex-parte* in her absence, and the Court (Oldfield and Brodhurst, JJ.) decreed the appeal, and set aside the orders of the lower Courts allowing execution. The respondent applied for the re-hearing of the appeal, and the application having been granted, the appeal again came on for hearing.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Pandit *Ajudhia Nath* contended that the amendment of the decree was illegal, as it was not at variance with the judgment as originally framed, and because no notice of the proposed amendment had been given to the judgment-debtor.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the respondent.

Mr. *Spankie* contended that the specification of relief granted in the decretal order of the judgment was arithmetically wrong, and at variance with that part of the judgment which preceded the decretal order; that a decree should agree with that part of the judgment which preceded the decretal order, and might be amended when it did not do so, notwithstanding it agreed with the judgment where the same specified the relief granted, but specified it erroneously by reason of arithmetical errors. It was further contended that the Court executing a decree, which had been amended by a Court competent to amend it, was not competent to determine whether the amendment was valid or invalid. In the execution-department only the questions mentioned in s. 244 of the Civil Procedure Code can be determined.

OLDFIELD and BRODHURST, JJ.—This appeal was on the part of a judgment-debtor against the decree-holder, and was heard and decided on the 25th November, 1885. It has been admitted for re-hearing. It appears the decree, as it originally stood, was for Rs. 1,282-5-6. Subsequently, on application by the decree-holder, the Court which passed the decree, purporting to act under s. 206 of the Code, altered the decree and made it for a sum of Rs. 1,460-14-0. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282-5-6 and had been improperly altered. The objection was disallowed. On

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appeal to the Judge that officer affirmed the order, and the judgment-debtor has preferred a second appeal to this Court.

We think our original order of the 25th November, 1885, must stand. The decree, as it originally stood, was in accordance with the judgment. The Court had no power to alter it as it did, and the proceeding is further irregular, in that no notice was given to the opposite party as required by s. 206. But a further contention on the part of the decree-holder is, that a question of this kind cannot be entertained in the execution-department; that the decree must stand as altered, and is not open to an inquiry whether it was properly altered when proceedings in execution are being taken. In our opinion this contention is not valid. We think that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and we think he could in this case raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. On these grounds our order on this application is similar to the order we made in November, 1885, setting aside the execution proceedings with costs.

Appeal allowed.

1886 *May* 22

CRIMINAL REVISION,

Before Mr Justice Straight, Offg. Chief Justice.

QUEEN-EMPRESS *v* MAHESHRI BAKHSH SINGH.

Act XLV of 1860 (*Penal Code*), *s* 189—*Threat of injury to public servant—Necessity of proving actual words used.*

In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain.

Held that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused.

THIS was an application for revision of an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 1st May, 1886,

affirming an order of Mr. P. Gr[illegible] Joint-Magistrate of Allahabad, dated the 1st April, convicting the applicant of an offence punishable under s. 189 of the Penal Code, and sentencing him to three months' rigorous imprisonment and Rs. 25 fine, or, in default, two months' further rigorous imprisonment. The applicant was charged with having threatened one Niamat Ali, head-constable of Karchana, for the purpose of deterring him from the proper exercise of his functions as a public servant. The case for the prosecution was that on the evening of the 28th December, 1885, the head-constable was inquiring into a burglary which had taken place the night before in the house of one Mata Dín, and was questioning certain persons of suspicious character, when the accused came up and threatened him by saying that these persons were his ryots, and if they were questioned further, he (the accused) would make a complaint about him. The head-constable deposed that the accused also threatened another constable by saying that he could have him deprived of his badge of office; but the constable in question stated that he had heard no such threat. The other witnesses for the prosecution differed from the head-constable as to the exact words used by the accused to the latter, though they agreed as to the general effect of those words. The Joint-Magistrate was of opinion that the offence specified in s. 189 of the Penal Code was clearly proved, and convicted and sentenced the applicant as above-mentioned. On appeal, the Sessions Judge observed :—"It does not matter what the words used were. The witnesses do not agree as to the exact words used. We must look to the intention with which the words were used and the effect they had. It is perfectly plain to me that the intention was to intimidate the police-officer, and so to deter him from doing his duty; and it is in evidence that though the officer was not deterred from proceeding with his inquiry, the investigation was seriously hindered and impeded by the attitude taken by the appellant. Under these circumstances the Magistrate's order was, in my judgment, fully justified, and I therefore affirm both the conviction and sentence."

It was contended on behalf of the applicant that in the absence of proof of the exact words used and complained of, the conviction under s. 189 of the Penal Code was improper.

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Lala *Lalta Prasad*, for the applicant.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

STRAIGHT, Offg. C. J.—This conviction cannot be sustained. There is a serious conflict of testimony as to the words which were used by the petitioner regarding the complainant Nizamat Ali, and it is exceedingly doubtful, upon the face of the whole evidence, whether any such threat of injury, as came within s. 189 of the Penal Code, was held out by the petitioner to the complainant. I do not agree with the Judge's observation, that it is immaterial what the words used actually were; on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether, in fact, a threat of injury to the constable was really made by the petitioner. It does not appear in what mode the complainant was conducting his examination of the several persons suspected of participation in the burglary, and it is possible that he conducted it in such a manner as might properly elicit from the petitioner a remonstrance or observation as to the impropriety of his conduct, accompanied by a threat to complain of him, which under such circumstances could not be the subject of a charge under s. 189. However this may be, the case is such a doubtful one that the conviction is not sustainable. The application for revision must, therefore, be allowed, and quashing the orders of the Magistrate and the Judge, I acquit the petitioner, and direct that he be at once released, and that the fine, if realized, be refunded.

Conviction set aside.

Before Mr. Justice Straight, Offg. Chief Justice.

1886 *May* 28.

QUEEN-EMPRESS *v.* JUGAL KISHORE.

Act XLV of 1860 (*Penal Code*), *s.* 182—*Prosecution under s.* 182—*Criminal Procedure Code, s.* 195.

A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen-Empress* v. *Radha Kishan* (1) overruled.

Where a specific false charge is made, the proper section for proceedings to be adopted under is s. 211 of the Penal Code.

(1) I. L. R., 5 All. 36.

THIS was a case reported to the High Court for orders by Mr. T. Benson, Sessions Judge of Saháranpur. In this case three persons named Chajju Ram, Sadu Ram, and Jugal Kishore, were tried and convicted by the Cantonment Magistrate of Roorkee of an offence under s. 182 of the Indian Penal Code. The false information, in respect of which they were charged and tried, was given to a head-constable, and was to the effect that they believed it was probable that stolen property would be found in the complainant's house. The house was accordingly searched, but no stolen property was found, and it appeared that the object of the accused in giving the information was merely to annoy and humiliate the complainant. The latter obtained sanction from the District Superintendent of Police to prosecute the accused, and in the result they were tried and convicted as above mentioned, and fined Rs. 10 each. The Sessions Judge was of opinion that the conviction was bad, inasmuch as a private person was not competent to institute proceedings under s. 182 of the Penal Code, with reference to the ruling of Straight, J., in *Queen-Empress* v. *Radha Kishan* (1). He added:—"It appears to me that the High Court's ruling in *Queen-Empress* v. *Radha Kishan* (1) does away entirely with the remedy which apparently, on the face of s. 182, a private person has who is injured by false information given to the police, where such information is not in the nature of a complaint or institution of proceedings. It would appear to me, however, that the person so aggrieved has no other remedy. Nor can I see anything in s. 195 of the Criminal Procedure Code indicating that a private person cannot prosecute under s. 182,—rather the contrary. The section apparently contemplates a prosecution on the part of a private person sanctioned by a police-officer."

STRAIGHT, Offg. C. J.—I am glad that the learned Judge has reported this case, because it has afforded me an opportunity of considering my ruling in the case of *Queen-Empress* v. *Radha Kishan* (1). Upon further consideration I have come to the conclusion that the latter portion of my judgment in that case was erroneous, and that a prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false informa-

(1) I. L. R., 5 All. 36.

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tion was given, or of his official superior. I am induced to adopt this altered view upon closer consideration of s. 195 of the Criminal Procedure Code, where a distinction is drawn between "sanction" and "complaint;" and I think that by the use of the former word it was contemplated that a prosecution may emanate from some person other than the officer interested. Though I take this view of the matter now, it would in no way have altered the order I made in *Queen-Empress* v. *Radha Kishan* (1), had I held it when that was passed, as, in my opinion, when a specific false charge is made, as in that case, the proper section for proceedings to be adopted under is s. 211. With these remarks the record may be returned.

APPELLATE CIVIL.

1886 *May* 29.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

LACHMAN SINGH AND OTHERS (DEFENDANTS) *v.* SALIG RAM AND OTHERS (PLAINTIFFS).*

Lambardar and co-sharer—Government revenue—Payment by lambardar of arrears of revenue due by co sharer—Charge—Act XII of 1881 (*N.-W. P. Rent Act*), s. 93 (*g*).

In execution of a decree obtained by a lambardar under s. 93 (*g*) of the N.-W. P. Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it, and could bring it to sale to satisfy the decree.

Held that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (2) referred to.

The facts of this case are stated in the judgment of the Court.

* Second Appeal No 1663 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 22nd August, 1885, reversing a decree of Maulvi Muhammad Wajid Ali Khan, Munsif of Mainpuri, dated the 18th February, 1885.

(1) I. L. R., 5 All. 36. (2) 11 Moo. I. A. 253.

Munshi *Madho Parshad*, for the appellants.

Pandit *Nand Lal*, for the respondents.

OLDFIELD, J.—The facts are as follows :—The appellant (defendant) Lachman Singh, lambardar and co-sharer in mauza Gujarpur, satisfied arrears of revenue due on the shares of his co-sharers, defendants 2, 3, and 4, and brought a suit against them under s. 93 (*g*) of the Rent Act, to recover the amount he had paid, and obtained a decree, and in execution attached a 2-biswa and 7½ biswansi share on which the arrears had accrued.

The plaintiffs-respondents took objections to the attachment, they having, subsequently to Lachman Singh's decree, but prior to attachment, purchased the property from Lachman Singh's judgment-debtors in satisfaction of a mortgage-debt, and they contended that the property was not liable to sale under the decree. This objection was disallowed, and they have brought this suit to have it declared that the property is not liable to be sold in execution of the defendant Lachman Singh's decree, and to remove the attachment.

There were several defences to the suit set up by the principal defendant, but the only one with which we are concerned in this appeal is that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he obtained a charge on it, and can bring it to sale to satisfy the Rent Court decree. The first Court dismissed the suit on the authority of a decision of this Court—*Wazir Muhammad Khan* v. *Gauridat* (1). The lower appellate Court has decreed the claim, apparently holding that the appellant Lachman Singh's contention that, by paying revenue, he obtained a charge on the estate, was invalid.

We have now an appeal on the part of the defendants. The question we have to decide is, not so much whether the defendant Lachman Singh obtained a charge on the property of the plaintiffs' vendors, as whether he can enforce any such charge in execution of the Rent Court decree which he holds. The decree which he holds is in a suit brought under s. 93 (*g*), Rent Act, in the Revenue Court. It is, and can be, no more than a decree for money against the vendors of the plaintiffs for arrears of Government revenue

(1) I. L. R., 4 All. 412.

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payable by them through the lambardar. The suit does not, and could not, in a Revenue Court, seek to establish or enforce a charge on property, and neither does the decree give it, nor are there any powers conferred on the Revenue Court in execution of its decrees to enforce charges on immoveable property. S. 171 and the following sections deal with the powers of the Court in execution, which are confined to realization from personal and immoveable property of the judgment-debtors.

No doubt, by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid down by their Lordships of the Privy Council in *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee* (1); but that case is also an authority for the view I take in this case, that a charge of this nature cannot be enforced under a decree which is merely a personal decree against the judgment-debtors, against whom it was passed by a Revenue Court not competent to do more than pass a personal decree. If the defendant wished to establish a charge against the property in the hands of the plaintiffs, he should have established the same by suit against them in a Court of competent jurisdiction.

The case referred to by the first Court has no bearing on the question before us.

Second Appeal No. 379 of 1882 decided by a Division Bench of this Court on the 9th March, 1883, was referred to by the pleader for the appellants, to support his contention, and no doubt it does do so; but for the reasons I have stated, I am unable to concur in the view of the law taken in that case. I would dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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(1) 11 Moo. I. A. 258.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1886
June 3.

DALIP AND OTHERS (DEFENDANTS) *v.* GANPAT (PLAINTIFF)*

Hindu Law—Inheritance—Sudras—Illegitimate son.

Held that an *Ahir* who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra *Vencatachella Chetty* v. *Parvathammal* (1), *Parisi Nayudu* v. *Bangaru Nayudu* (2), *Viraramuthi Udayan* v. *Singaravelu* (3), *Rahi* v. *Govinda* (4), and *Narayan Bharthi* v. *Laving Bharthi* (5) referred to

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Baroda Prasad Ghose*, for the appellants.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

OLDFIELD and TYRRELL, JJ.—This appeal raises a question as to the rights of inheritance of illegitimate sons of Sudras, the parties in this case being *Ahirs*. The plaintiff claims to succeed to a share of the property left by Shahzadeh, on the ground that he is his son by a woman named Musammat Salomi. It has been found as facts by both Courts that Salomi was the wife of Shahzadeh's paternal uncle, and on the death of her husband she entered into a *karao* marriage with one Sukhain, and that the plaintiff was the offspring of an adulterous intercourse between her and Shahzadeh after her marriage with Sukhain. Accepting these facts, with the findings on which we cannot in second appeal interfere, we are of opinion that the plaintiff has no right to inherit Shahzadeh's property. He is the offspring of adulterous and consequently illegal intercourse, and incapable of inheriting even as a Sudra.

There are numerous decisions by the Courts to this effect—*Vencatachella Chetty* v. *Parvathammal* (1), *Parisi Nayudu* v. *Bangaru Nayudu* (2), *Viraramuthi Udayan* v. *Singaravelu* (3), *Rahi* v. *Govinda* (4) and *Narayan Bharthi* v. *Laving Bharthi* (5).

The appeal is decreed, and the decrees of the Courts below are set aside, and the suit dismissed with all costs.

Appeal allowed.

* Second Appeal No. 1725 of 1885, from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhánsi, dated the 7th October, 1885, confirming a decree of Syed Mahdi Ali, Extra Assistant Commissioner of Mau Ranipur, Jhánsi District, dated the 28th August, 1885.

(1) 8 Mad. H. C. Rep. 134. (3) I. L. R., 1 Mad. 306.
(2) 4 Mad. H. C. Rep. 204. (4) I. L. R., 1 Bom. 97.
(5) I. L. R., 2 Bom. 140.

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June 8.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

SITLA BAKHSH, MINOR BY HIS GUARDIAN PUNNO KUAR, AND ANOTHER (DEFENDANTS) *v.* LALTA PRASAD (PLAINTIFF) *

Mortgage—Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, *s.* 8—*Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of* 1882 *(Transfer of Property Act).*

The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh* v. *Dwarka Lall Mundur* (1) and *Madho Pershad* v. *Gajadhar* (2) followed.

In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

Held, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed.

Held also that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law.

THE plaintiff in this case claimed possession of an eight annas share of a village called Bharauli as the conditional vendee under a deed of conditional sale, dated the 13th December 1864, which

* First Appeal No 145 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th January, 1885.

(1) I. L. R., 3 Calc. 397; L. R., 5 Ind. Ap. 18.
(2) I. L. R., 11 Calc. 111; L. R., 11 Ind. Ap. 186.

had been foreclosed under Regulation XVII of 1806. He stated in his plaint as follows:—

"An application for foreclosure was presented on behalf of the plaintiff on the 12th June, 1882, regarding an eight annas zamindari share of the said village, excepting the eight annas zamindari share owned and possessed by himself, and after deducting Rs. 780 received on account of interest, that application was valued at Rs. 20,887-4-0. But the mortgage-money, including principal and interest or any portion thereof, was not deposited on behalf of any defendant, in consequence of which the plaintiff, at the end of the usual year of grace, became absolute owner, entitled to the proprietary possession of the remaining eight annas zamindari share, together with all the rights and interests appertaining thereto. The plaintiff acquired that on the 10th July, 1883, the date on which the year of grace expired; but the defendants, who are in possession, have not delivered possession, but have refused to do so, and that is the date on which the cause of action accrued."

The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiff a decree for possession of the property. The defendants Sitla Bakhsh (a minor represented by his mother and guardian,) and Sonidha Kuar appealed to the High Court, impugning the decree on grounds which are stated in the judgment of the Court.

Mr. *C. H. Hill*, Pandit *Sundar Lal*, Pandit *Bishambhar Nath* and Pandit *Nawal Bihari*, for the appellants.

Mr. *Habibullah*, Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

STRAIGHT, Offg. C. J.—This an is appeal from a decision of the Subordinate Judge of Cawnpore, passed upon the 15th January, 1885. There were several defendants to the suit, but we are only concerned in the appeal to this Court with one Sitla Bakhsh, a minor, who is represented by his mother, Musammat Panno Kuar, as his guardian *ad litem*, who is the sole appellant. The suit was brought by the plaintiff-respondent, as the proprietor of eight annas in a certain property, to obtain possession of that property, on the basis of a document of the 13th December, 1864, which, the plaintiff contends, amounted to a conditional sale-deed, and certain foreclosure proceedings taken thereon. It is, in fact, upon the strength of a statutory title, which he says that he obtained by the operation of Regulation XVII of 1806, that he claims to be entitled to possession of the property to which he lays claim. Now the relief which is asked in the plaint is that "a decree for proprietary possession of eight annas zamindari share out of the entire

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sixteen annas zamindari in mauza Bharauli, pargana Bindki, tahsil Kaliyanpur, in the Fatehpur district, with all the rights appertaining to the aforesaid zamindari, may be passed in the plaintiff's favour against all the defendants by actual dispossession of Pahlwan Singh, Sitla Bakhsh, Musammat Chhogar Kuar, and Lala Har Prasad, defendants, and by extinction of the rights of the above-named defendants, by protecting the right of Sheo Ram defendant, and declaring the want of title of Balmukand, *pro formâ* defendant." It is therefore quite clear from the mode in which this suit was presented in the Court below, that it was a suit based upon the statutory title which the plaintiff alleged he obtained under the Regulation I have already mentioned, and it was for the possession of the property upon the strength of that statutory title. Hence it follows that unless it is clearly and satisfactorily established that the provisions of the 8th clause of Regulation XVII of 1806 were satisfied, the plaintiff cannot succeed in the present suit. The case has taken considerable time in argument, but has not been unnecessarily protracted, because the points that have been raised by the learned counsel for the appellant were well worthy of attention. The first contention was, that the father of Sitla Bakhsh, the appellant, having purchased at an auction-sale held in execution of a decree obtained upon a bond of 1859, which was prior in date to the mortgage or conditional sale-deed upon which the plaintiff claims, he therefore had a prior lien to the plaintiff, and was entitled to remain in possession of the property as being the owner of a prior charge. I have already indicated that in regard to that contention of the learned counsel for the appellant, it appears to me to turn upon a question of fact, namely, whether the purchase by the father of Sitla Bakhsh was made at a sale in execution of a decree passed upon an instrument which created a prior charge to that of the plaintiff. Now, as a matter of fact, it seems to me that the Subordinate Judge was right in the conclusions at which he arrived, and has correctly held that, regarding all the circumstances, the sale at which the appellant's father purchased the share in this very village was a sale in execution of the simple money-decree, which had been obtained by one Har Dayal and some one else against Gulab Rai and Kishen Dayal. I therefore, as regards this contention, was against the

learned counsel for the appellant, and did not require to be addressed on this point by the learned Pandit who appears for the respondent. The next objection taken was that, upon a true construction of this deed of the 13th December, 1864, the instrument was not in the nature of a conditional sale, and that it was nothing more nor less than a simple mortgage, which, under certain circumstances, could and would become a usufructuary mortgage. Of course, if this construction is a well-founded one, it is obvious that this suit, which is a suit for possession of the property under a title created by the foreclosure proceedings of 1882, cannot succeed, and that we have no power to decree possession to the plaintiff as a usufructuary mortgagee. I think, however, it will be best for me, assuming for the purpose that the document constituted a conditional sale, to deal with the case in reference to the third contention of the appellant's learned counsel, which is based upon the informality or rather invalidity of the foreclosure proceedings taken by the plaintiff. I adopt this course in order to avoid the possibility of conflict between two Division Benches of this Court as to the construction to be placed upon the instrument of the 13th December, 1864, for though I do not wish to commit myself definitively to the opinion, I confess I entertain grave doubts as to whether it was correctly held on a former occasion that that document did amount to a conditional sale. I will, however, not dispose of the case upon that ground, because even assuming it to be the instrument contended for by the plaintiff, I think the suit fails by reason of the conditions precedent of the Regulation XVII of 1806 not having been satisfied. It may be taken as undoubted law, which their Lordships of the Privy Council have laid down in the most explicit terms in *Norender Narain Singh* v. *Dwarka Lall Mundur* (1) and *Madho Pershad* v. *Gajadhar* (2), that the provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but that strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right; and it is clear, not only by these decisions of their Lordships, but by a long course of decisions of this and other Courts in India, that the various requirements of that

(1) I. L. R., 3 Calc. 397, L. R., 5 Ind. Ap. 18.
(2) I. L. R., 11 Calc. 111, L. R., 11 Ind. Ap. 136.

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section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show, except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal* v. *Beni Lal* (1) and *Karan Singh* v. *Mohan Lal* (2), and an unreported ruling of the late Chief Justice and Mr. Justice Duthoit in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Council to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

(1) I. L. R., 3 All. 408. (2) I. L. R., 5 All. 9.

The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of Sitla Bakhsh and Musammat Sonidha Kuar with costs in proportion in this Court and in the lower Court.

TYRRELL, J.—I entirely concur.

Appeal allowed.

Before Mr. Justice Oldfield and Mr Justice Mahmood.

1886 *June 16.*

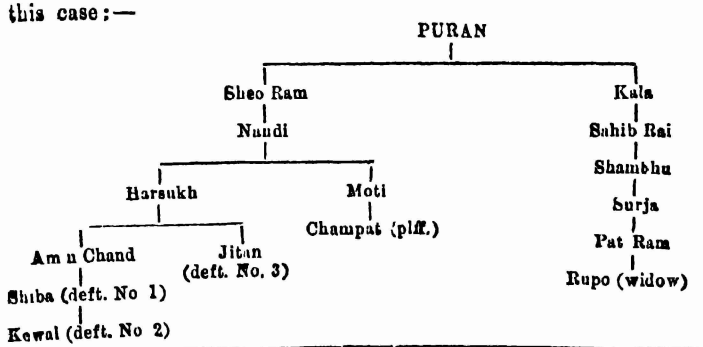
CHAMPAT (PLAINTIFF) *v.* SHIBA AND ANOTHER (DEFENDANTS) *

Hindu Law—Stridhan—Succession.

Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against *S* and his son by *C*, on the allegation that he and *J*, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

Held that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Dyhee* v *Baluk Ram* (1) followed. *Munia* v. *Puran* (2) distinguished.

The following table shows the relationship of the parties to this case:—



* Second Appeal No 1442 of 1885, from a decree of C. W. P Watts, Esq., District Judge of Saharanpur, dated the 16th July, 1885, reversing a decree of Maulvi Syed Tajammul Husain, Munsif of Shamli, dated the 8th December, 1884.

(1) 11 Moo. I. A. 135. (2) I. L. R., 5 All. 310.

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Under a deed of gift dated the 27th April, 1875, Surja, who owned the zamindari property in suit, conveyed it to his son's widow Rupo, who died on the 1st February, 1884. Thereupon Shiba, defendant No. 1, stating that his minor son Kewal, defendant No. 2, had been adopted by the deceased widow, obtained possession of the property and mutation of names in his favour in the revenue records on the 3rd April, 1884. The present suit was instituted by Champat on the allegation that he and Jitan, defendant No. 3, were entitled, under the Hindu Law, to succeed in moieties to the properties left by Musammat Rupo as her *stridhan*, she having died without issue. The object of the suit was recovery of possession of half of the property left by the widow.

The suit was resisted by Shiba, defendant No. 1, on behalf of himself and his minor son Kewal, defendant No. 2, on the ground that the latter had been adopted by the widow and was therefore entitled to succeed to the whole of her property. Another plea in defence was, that the widow had left a brother of the name of Kurali, who, in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff.

Jitan, defendant No. 3, did not appear to defend the suit.

The Court of first instance (Munsif of Shamli) held that the alleged adoption of Kewal by the widow was not proved; that she having been lawfully married to Pat Ram, the plaintiff was a *sapinda* and near relative of her husband, and could therefore maintain the suit, notwithstanding the existence of Kurali, the brother of the deceased widow. Upon these grounds the Munsif decreed the claim.

Upon appeal the District Judge of Saharanpur reversed this decree. The question of adoption was not insisted upon before him; but he held that the property, being *stridhan* of the widow, would devolve upon her death on her brother Kurali to the exclusion of the plaintiff.

From this decree the plaintiff appealed to the High Court. It was contended on his behalf that upon the facts found by the lower Courts, he was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu law.

Mr. *Habibullah*, Pandit *Ajudhia Nath*, and Pandit *Sundar Lal*, for the appellant.

Lala *Juala Prasad* and Pandit *Nand Lal*, for the respondents.

MAHMOOD, J. (After stating the facts as stated above, continued):—I have no doubt that this contention is perfectly sound and must prevail. It has been found by the Munsif that Musammat Rupo was married to Pat Ram in one of the four approved forms of marriage, and this finding was not disturbed in the lower appellate Court. Indeed, in the Court of first instance, no allegation was made on behalf of the defence to the effect that the marriage of Rupo was in an unapproved form; and this being so, the observations of the Lords of the Privy Council in *Thakoor Deyhee* v. *Baluk Ram* (1) seem to me to dispose of the point raised in this appeal. Their Lordships observed:—"The devolution of *stridhan* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that *Choteh Bebee* was not married according to one of the four approved forms. In that case her *stridhan* would, according to the Mitakshara (chap. ii, s. xi, art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 *Strange's* "Hindu Law," pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon (2)."

This passage leaves no doubt upon the question now before us, and indeed the learned pleaders for the respondents have not contested it, nor have they contended that the marriage of Musammat Rupo was in one of the inferior forms which would render her *stridhan* heritable by her parental family. All that the learned pleaders have asked us on behalf of the respondents is, that we should remand the case to the lower appellate Court for a finding as to the adoption of Kewal by Musammat Rupo. But the plea was distinctly given up in the lower appellate Court, and, under the circumstances, I do not think we should make a remand for a finding upon the issue, the Munsif, after a careful consideration of the evidence, having recorded a distinct finding against the alleged adoption.

(1) 11 Moo. I. A. 135. (2) At p. 175.

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I would decree this appeal with costs, and, reversing the decree of the lower appellate Court, restore that of the Court of first instance.

But I wish to add that the Full Bench ruling of this Court in *Munia* v. *Puran* (1) which was referred to at the hearing, is clearly distinguishable from this case, because all that was ruled there was that a woman's *stridhan*, being property over which she had absolute control, her husband's relations have no reversionary interest in such property so as to be entitled to set aside any acts of transfer made by her during her lifetime. There is nothing in that case to warrant the conclusion that upon the death of a widow, when the question of devolution arises, her husband's relations would not be her heirs.

OLDFIELD, J.—I concur.

Appeal allowed.

1886 *April* 5.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

AMIR ZAMA (PLAINTIFF) *v.* NATHU MAL (DEFENDANT) *

Set-off—Res judicata—Civil Procedure Code, ss. 13,111—*Court-fee on set-off.*

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

Held that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set-off was not barred under the provisions of s. 13.

Held also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

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* Reference No. 179 of 1886, under s. 617 of the Code of Civil Procedure, by W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad.

(1) I. L. R., 5 All. 310.

THIS was a reference by Mr. W. R. Barry, Judge of the Allahabad Small Cause Court. The facts of the case and the points of law referred were stated by him as follows :—

"The defendant Nathu Mal, on the 13th November, 1885, brought a suit against the plaintiff Amir Zama, to recover a sum of Rs. 91-9-9, on the following allegation, namely, that from the 30th November, 1884, to the 16th May, 1885, the plaintiff (present defendant) sold to the defendant (present plaintiff) goods of the value of Rs. 441-7-3; that part of the said value was paid by the defendant and part of the said goods were returned, and that there remained a balance of Rs. 91-9-9 due from the defendant to plaintiff. At the hearing the defendant pleaded that he did not purchase the goods, but had received them to sell on behalf of the plaintiff on commission, and an issue was joined whether the goods were sold and delivered by plaintiff to defendant. The Court found on the facts that the goods were never sold to defendant as alleged by plaintiff, and the plaintiff's suit was dismissed.

"On the 3rd February, 1886, the defendant in the former suit brought a suit against the plaintiff in the former suit for wages, alleging that the defendant had engaged him to sell cloth on his behalf at a remuneration of Rs. 8 per mensem; that the plaintiff had served the defendant accordingly, but the remuneration had not been paid. At the hearing the defendant, among other matters, pleaded a set-off of Rs. 91-9-9 on the averment that he had intrusted certain goods to the plaintiff to be sold by him on behalf of the defendant on commission-sale; that the plaintiff had sold part of the goods and returned others; and that goods of the value of Rs. 91-9-9 had not been accounted for by the plaintiff. The defendant therefore claimed this sum as a set-off. It is admitted by the defendant that the goods which he now avers to have been made over to the plaintiff on commission-sale, are the same that he alleged to have been sold to plaintiff in the former suit. The claim in the former suit for the price of goods sold and delivered and that now made in the set-off, arise out of exactly the same group of facts; the only difference between the two claims is, that in the former the defendant (then plaintiff) alleged an out-and-out sale to the plaintiff (then defendant), while in the

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latter the defendant alleges that the goods were made over to the plaintiff on commission-sale. The set-off appears to satisfy the requirements of s. 111, Civil Procedure Code, in every respect except one, namely, that the money now claimed is legally recoverable by the defendant from the plaintiff, and on this point I entertain a reasonable doubt.

"The statement in the plaint of the 13th November, 1885, that the goods were sold and delivered to the defendant in that suit, is doubtless an admission which is relevant against the present defendant; but this admission is not conclusive proof of the matter admitted unless it operates as an estoppel (Evidence Act, s. 31). Now this admission does not amount to an estoppel under Chapter VIII of the Evidence Act, for the other party has not in any way acted on the admission, nor changed his position in consequence thereof. But the decree in the former suit may operate as *res judicata*, so as to make the claim now advanced inadmissible; or, in the language of the English text-books, the decree may operate as an estoppel by record. The arguments in favour of admitting the set-off appear to be briefly as follows:—

"In the former suit the question that was put in issue and determined was—Were the goods sold and delivered by plaintiff to defendant? There was no finding on the issue—Were the goods intrusted to the defendant to be sold on behalf of the plaintiff on commission-sale? This is the point that is in issue in the present suit, and there was no finding on this point in the former suit. The current of English decisions seem to favour the admissibility of the set-off, and the judgment of Lord Westbury in *Hunter* v. *Stewart* (1) is a strong authority on this side. The allegations and equity of the suit are different from the allegations and equity of the set-off: compare Broom's *Legal Maxims*, 2d ed., page 250:—'If, however, it be doubtful whether the second action is brought *pro eâdem causâ*, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action." It seems clear that the evidence given in the suit, which was directed to prove *sale* and delivery of the goods, would not sustain the claim made

(1) 31 L. J., Ch. 346.

in the set-off, *viz*, that the goods were intrusted to the plaintiff for sale by him as a commission agent. And numerous other authorities might be adduced in support of this view.

"On the other side—*i e.*, against the admissibility of the set-off, there are the terms of s. 13, *Explanation* II of the Code of Civil Procedure:—'Any matter which might or ought to have been made the ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.' It may be urged that in the former suit the plaintiff should have brought forward his whole title and asserted the two claims in the alternative. A strong authority in support of this view is *Woomatara Debia* v. *Unnopoorna Dassee* (1) and *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (2) In the latter of these cases the judgment of Phear, J., seems to show clearly that their Lordships of the Privy Council have deliberately adopted a stricter view than that held by the Courts in England. This view is confirmed by a comparison of the terms of s. 2, Act VIII of 1859 with those of s. 13, Act XIV of 1882. The former section forbids a Civil Court from taking cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and this section was in force when the judgments quoted above were passed by the Judicial Committee and the Calcutta High Court. The present section would seem to go further than the old section, and to enact as law the proposition affirmed by the Privy Council.

"It may be argued that these rulings were given in cases in which a plaintiff sought to establish a double title to the same property, and do not apply to a case like the present, where no title is in issue, and the claim is for money and not for possession of immoveable property; also that the frame of the first suit may be due to mistake or negligence on the part of the plaintiff's pleader, and that the plaintiff should not suffer for the pleader's mistake; and it may be replied that the principle affirmed in *Woomatara Debia* v. *Unnopoorna Dassee* (1) is general in its terms, and may well be held to govern cases where the claim is simply for money, and not to establish a title to property; and that if a plaintiff alle-

(1) 11 B. L. R. 158. (2) I L. R., 2 Calc. 152.

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ges that he sold goods to a defendant when, in point of fact, he did not sell them, but merely intrusted the goods to him for sale on commission, the allegation is one altogether within the personal knowledge of the plaintiff, and it is not unreasonable that he should be precluded from suing on another and altogether different title for the same relief. My own opinion is that, according to the law in force in British India, the set-off of the defendant is inadmissible, because the sum of money claimed therein is not legally recoverable owing to the fact that the claim is *res judicata*. And I would respectfully ask for a decision as to whether, under the circumstances stated above, the suit bars the set-off.

"I would further ask for a decision on the following point:—What court-fee, if any, is payable on this set-off? I am of opinion that the set-off is chargeable with the same court-fee duty as if the claim made in the set-off had been made in a separate suit. S. 111, Civil Procedure Code, says:—'Such set-off shall have the same effect as a plaint in a cross-suit;' and if the set-off is to have the effect of a plaint, it seems reasonable that it should be stamped as a plaint under the provisions of s. 6, Act VII of 1870. On the other hand, the Court-Fees Act does not anywhere lay down that a set-off shall be chargeable with stamp duty. A set-off is treated in Chapter VIII of the Civil Procedure Code as of the same nature as a written statement, or even as part of a written statement: and it has been ruled [*Cherag Ali* v. *Kadir Mahomed* (1)] that no court-fee is payable on a written statement filed by a defendant at the first hearing. It has also been suggested at the Bar that the court-fee duty on the set-off cannot exceed the duty payable on the sum by which the set-off exceeds the claim. I am aware of no authority in support of this position, and, on the grounds of general principle, consider that since the set-off has the same effect as a plaint in a cross-suit, the set-off should pay the same court-fee duty as if it were a plaint. But as the Court-Fees Act prescribes no fee as payable on a set-off, I have reasonable doubts on the question, and respectfully ask for a decision thereon."

The parties did not appear.

OLDFIELD and BRODHURST, JJ.—The facts are these. The plaintiff Amir Zama has instituted this suit against the defendant

(1) 12 Calc. L. R. 367.

Nathu Mal to recover money due as wages, alleging that the defendant engaged him to sell cloth on his account at a fixed monthly salary.

It appears that the defendant has previously sued the plaintiff to recover Rs. 91 9-9 as due to him for the price of cloth sold and delivered by the defendant to the plaintiff. In that suit the plaintiff (then defendant) pleaded that there was no sale to him of any cloth, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. Now the defendant claims a set-off of Rs. 91-9-9 against the plaintiff's claim, on the ground that out of it Rs. 87-5-0 are due to him as the price of cloth which the plaintiff had sold on his account on commission, —the rest due for cloth which the plaintiff purchased. In our opinion, under the circumstances stated, the answers to the reference should be (i) that the defendant is entitled, under s. 111, Civil Procedure Code, to set-off this sum of Rs. 87-5-0 claimed as due for cloth sold on commission against the plaintiff's demand, as it is an ascertained sum claimed to be due with reference to the same contract under which the plaintiff's demand arises; (ii) that the claim for the set-off of Rs. 87-5-0 is not barred under the provisions of s. 13, Civil Procedure Code. The former suit was brought by the defendant for the price of goods sold and delivered by the defendant to the plaintiff, whereas the defendant's present claim is for money payable by the plaintiff to him for money received by the plaintiff for his (defendant's) use, and as the price of cloth belonging to defendant and sold on his account by plaintiff.

The two claims are founded on different titles, and the issue raised by the latter was not in issue in the former suit, and was not heard and decided. The set-off as to Rs. 4-4-0, price of cloth alleged to have been sold to plaintiff, is not entertainable. Our reply to the remaining question is, that the court-fee payable on the claim for set-off should be the same as for a plaint in a suit.

1886
April 20.

Before Mr. Justice Straight, Offg Chief Justice, and Mr. Justice Brodhurst.

SAMAR ALI (PLAINTIFF) *v.* KARIM-UL-LAH (DEFENDANT)*.

Mortgage—Usufructuary mortgage—Redemption—Regulation XXXIV of 1803, *ss* 9,10 *—Act XXVIII of* 1855*—Act XIV of* 1870*—Act IV of* 1882 (*Transfer of Property Act*), *s* 2.

A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—"Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (5) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money.

Held that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

Held that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property.

THE plaintiff in this suit claimed to recover possession of one-sixth of certain mortgaged land. The mortgage was for Rs. 100, with possession, and the deed, which was dated the 20th September, 1846, contained the following conditions:—

"The conditions are these:—Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged

* Second Appeal No. 1254 of 1885, from a decree of H. G. Pearse, Esq., Additional Judge of Moradabad, dated the 1st May, 1885, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Nagina, dated the 24th December, 1884.

land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property."

The plaintiff represented in title one of the original mortgagors, who owned one-sixth of the land. The equity of redemption of the remaining five-sixths had been purchased by the defendant the mortgagee. The plaintiff alleged that the mortgage-money in respect of one-sixth of the property was Rs. 16-10-8, that is, one-sixth of Rs. 100, and that the defendant had received more than this sum together with interest at the rate of 12 per cent. per annum from the property, but notwithstanding this he would not restore the land. The defendant set up as a defence, *inter alia*, that with reference to s. 62 (*b*) of the Transfer of Property Act and the terms of the mortgage-deed, the mortgagor had not a right to recover the property until he paid the mortgage-money.

The Court of first instance held that the mortgage in question was not governed by the provisions of s. 62 of the Transfer of Property Act, and that, having regard to the provisions of Regulation XXXIV of 1803, if an account showed that the principal money, together with interest at 12 per cent. per annum, had been paid from the profits, the plaintiff had a right to recover the property. The Court having taken an account, found that from the profits of the property, after deducting Government revenue, the principal money together with interest at the rate mentioned above had not only been realized, but a surplus of Rs. 45 was due to the plaintiff; and it gave the plaintiff a decree for joint possession of the property and for Rs. 45.

On appeal by the defendant the lower appellate Court held that the Regulation relied on by the first Court was not applicable, and the plaintiff was not entitled to recover the property until he paid the mortgage-money as provided by the deed of mortgage, and dismissed the suit.

The plaintiff appealed to the High Court, contending that the decision of the first Court was correct, and the lower appellate Court had improperly dismissed the suit.

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SAMAR ALI v. KARIM-UL-LAH.

Mr. *G E. A. Ross*, for the appellant.

Mr. *C. Dillon*, Munshi *Hanuman Prasad*, and Munshi *Madho Prasad*, for the respondent.

STRAIGHT, Offg C. J.—This is a suit for the redemption of a mortgage dated the 20th September, 1846. The mortgage was of a usufructuary character, and admittedly under it the mortgagee obtained possession of the property. The plaintiff, who is the representative of the interest of the mortgagor to the extent of a sixth, comes into Court and seeks to redeem his share, upon the allegation that the principal amount and interest due upon the mortgage have been satisfied by enjoyment of profits, and he is entitled to a balance of Rs. 45 over and above what was sufficient to discharge the mortgage. The plaintiff's case is, that both upon the construction of the document and by the law which regulates and affects the operation of that instrument, the amount of money which the defendant derived by way of profits from the property was sufficient to pay off the mortgage-money and its interest at twelve per cent. per annum.

Now the terms of that document have been read to me by Mr *Ross*, and the learned counsel for the respondent has conceded that they have been accurately rendered. It seems to me that the arrangement between the parties was, that the mortgagee should have possession of the property, and that he should enjoy the profits thereof, so long and until the principal sum was paid, in lieu of interest. It is true that the word "interest" was not specifically used; but it appears to me that this is the natural and reasonable construction of the deed; and such being the nature of the instrument, its effect was to place the mortgagee in possession of the profits of this property, which would enable him to realize annually a larger amount of interest than twelve per cent per annum. By the Regulation issued by the Governor-General in Council, No. 34 of 1803, it was provided in ss. 9 and 10 that the rate of interest to be allowed to the mortgagee was not to exceed twelve per cent. per annum; and that no matter whether the parties made a contract for the payment of a larger amount of interest, the law would not recognize any contract for payment of a larger amount than twelve per cent. Now this Regulation is applicable to this mortgage

contract of 1846, which is before us, if its provisions have not been disturbed by the operation of any subsequent legislation. If they have not, the matter stands now as it did in 1846, and we are bound by the rules mentioned in that Regulation. The question then to be considered is, whether by Act XXVIII of 1855, or by Act IV of 1882, the provisions of ss. 9 and 10 of Regulation XXXIV of 1803 have been affected or abrogated. Now I do not think that it can be seriously denied that one of the rights affecting the contract of mortgage is the right of the mortgagor to redeem the property mortgaged. Now, as I have said, the contract of mortgage in the present case being subject to the provisions of the Regulation, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property. I think that those provisions of the Regulation of 1803 were incidents attached to the mortgagor's right, of which he was, and is, entitled to have the benefit. By Act XXVIII of 1855 all the rights conferred by this Regulation were specifically saved, and the same may be said of Act XIV of 1870.

Then with regard to Act IV of 1882, s. 2 of that Act specifically provides that "rights and liabilities arising out of a legal relation constituted before this Act comes into force" shall be saved. This being the view I take of the matter, the appeal must be allowed, and the decree of the Judge being reversed, the case is remanded under s. 562 to the Court below for disposal on the merits.

The costs hitherto incurred in the litigation are to be costs in the cause.

BRODHURST, J.—I am of the same opinion.

Appeal allowed.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

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April 20

KHUDA BAKHSH (PLAINTIFF) *v* SHEO DIN AND ANOTHER (DEFENDANTS)*

Lease—Lease from year to year—Act VIII of 1871 (*Registration Act*), *s.* 17 (4) *—Act III of* 1877 (*Registration Act*), *s.* 49.

In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be

* Second Appeal No. 1154 of 1885, from a decree of F. E. Elliott, Esq., District Judge of Allahabad, dated the 13th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1885

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executed in his favour by the defendants, and dated respectively in January, 1875, and June, 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection · if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum." The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus :—"And if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection." The lower Courts held that the *sarkhats* were not admissible in evidence, as they required registration under s. 17 (4) of the Registration Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent.

Held that the two *sarkhats* created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice.

Held therefore that the leases did not fall under s. 17(4) of Act VIII of 1871 ; that their registration was not compulsory ; and that they could not be excluded from evidence under s 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory.

THE plaintiff in this case, Khuda Bakhsh, sued three persons—Sheo Din, Thakur Dayal, and Sital, *Ahirs* by caste—for possession of certain land, and for rent of the same, from the 26th June, 1880, to the 22nd May, 1884, and for the removal of a "*charahi*," a place for feeding cattle. The defendants set up as a defence to the suit, among other things, that the land did not belong to the plaintiff.

The plaintiff produced, in support of his title to the land and his claim for rent, two "sarkhats" or "kabuliyats," one purporting to be executed in his favour by Sital, son of Sheo Din, and the other by Sheo Din and Thakur Dayal, the former bearing date the 18th January, 1875, and the latter the 26th June, 1876 These documents were not registered.

The first document, after reciting that Sital had taken the land on a yearly rent of Rs. 4 and 4 sers of milk, for a place to live on, and for tethering cattle, from Khuda Bakhsh, set forth the following conditions:—"I promise and agree to pay the Rs. 4 and the 4 sers of milk yearly to the owner of the land without objection,

and will cause the receipt thereof to be indorsed on the *sarkhat*: any objection as to payment which is not so indorsed shall be unlawful * * * * * If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum, and I will pay rent at the rate of Rs. 8 per annum without objection."

The second document, after reciting that Sheo Din and Thakur Dayal were in need of land for tethering cattle, and that they had taken the land in front of the door of Khuda Bakhsh, owned and possessed by him, on a yearly rent of eight annas, for six years, set forth the following conditions:—"We promise and agree to pay the rent year by year, without objection, to the said Shaikh Khuda Bakhsh, and will cause the receipt thereof to be indorsed on the *sarkhat*. Except payments indorsed on the *sarkhat*, we will claim no other payments, and if we do, it will be invalid and unlawful * * * * and if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection."

The Court of first instance gave the plaintiff a decree for possession of the land, but dismissed the claim for rent and the removal of the "*charahi*," holding that the defendants had acquired by prescription a right to maintain the "*charahi*" on the land. It refused to take the "sarkhats" in evidence, holding that under s. 17 (4) of the Registration Act VIII of 1871, they were leases from year to year and therefore required to be registered, and not being registered, were not admissible in evidence. On appeal by the plaintiff, the lower appellate Court affirmed the decree of the first Court, concurring with it in its view in respect to the "sarkhats."

The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *J. Simeon* and Mir *Zahur Husain*, for the respondents.

MAHMOOD, J.—I am of opinion that this appeal must prevail, and the decree of the lower appellate Court be set aside, and the case be remanded for disposal on the merits. My reasons for this

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view are, that the suit was one for possession of a piece of land and for demolition of a "*charahi*" situate thereon. Both the lower Courts have found that the land belongs to the plaintiff, but that the defendants have acquired a right of easement to keep their "*charahi*" thereon. The learned District Judge has expressly stated that the two kabuliyats, dated the 18th January, 1875, and 26th June, 1876, were not admissible in evidence, as they needed registration under s. 17 (4) of Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent. Both these documents are in the Hindustani language, and I have read them to my brother Tyrrell, and we both look upon these leases as creating no rights except those of tenants-at-will. I speak of them as "leases," because of the definition of that word in s. 3 of the Act of 1871. There is, indeed, a statement in the early part of these leases, that the land was given for more than a year; but the most important clause in them is one common to both of them, namely that *at any time*, at the will and mere wish of the lessor, the lessees were to give up the land only at fifteen days' notice. According to the well-understood rules of construction, this latter clause governs all the previous clauses. This being so, the defendants could be asked to quit at any time before the lapse of the term. It did not create even the usual lease from month to month, but the lessees could be ejected at fifteen days' notice, which is the ordinary term of notice pr bably required by the law, even previous to the passing of the Transfer of Property Act, and the principle of which has been incorporated in ss. 106 and 111 of that Act. The leases therefore do not fall under s. 17 (4) of the Registration Act VIII of 1871, which was in force when the leases were executed. The clause (which corresponds to s. 17 (*d*) of the present Registration Act III of 1877) is thus worded: "Leases of immoveable property from year to year or reserving a yearly rent." The leases before us do not answer this description, and no other clause of the section is pointed out under which they would fall. Their registration was therefore not compulsory, and they could not be excluded from evidence under s. 49 of Act III of 1877. The question whether registration was compulsory is governed by the registration law in force at the time that the deeds

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were executed; but the question of admissibility being a matter of procedure, would be governed by the present law. The Judge has altogether excluded from his consideration the two leases, which are the most important evidence in the case, and without which the merits of the case cannot be considered. We ask him to admit these leases, and re-consider the whole case upon the evidence, and to record a fresh judgment under s. 574, Civil Procedure Code. I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court, leaving costs to abide the result.

I may add that in support of the view taken by me of the leases in this case, our attention has been called by the learned pleader for the appellant to an unreported judgment of the Full Bench of this Court (1), which supports the view taken by me, though the interpretation of the law in that case related to the old Registration Act of 1864.

TYRRELL, J.—I am of the same opinion.

Case remanded.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

1886 *April* 21.

KARAMAT KHAN (PLAINTIFF) *v.* SAMI-UDDIN AND OTHERS (DEFENDANTS).*

Act IV of 1882 (*Transfer of Property Act*), *ss.* 41, 48.—*Transfer by ostensible owner—Sir-land—Act XII of* 1881 (*N.-W. P. Rent Act*), *s.* 7—*Meaning of "held"—Statute, construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of* 1873 (*N.-W. P. Rent Act*)—*Sale of mortgagor's proprietary rights while that Act was in force—Right of mortgagee.*

In 1869, *A* and *J*, two co-sharers of a moiety of a ten biswas share in a village (*F* and *W* being also co-sharers in the same moiety), joined with *H*, the holder of the other moiety, in giving to *K* a usufructuary mortgage of 87 bighas of land, being the whole of the *sir*-land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, *F*, *W* and *A* gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of *sir*-land; and it was stated in the deed that half the mortgage-money due to *K* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In

* Second Appeal No. 1266 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 22nd July, 1885, modifying a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 28th March, 1884.

(1) Since reported in *Weekly Notes*, 1886, p. 115.

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November, 1876, *H's* five biswas share, together with its *sir*-land, was sold in execution of a decree. Subsequently, *K*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land, by virtue of his mortgage-deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F's* and *W's* share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November, 1876, *H* became an ex-proprietary tenant of his *sir* land, and that to give the plaintiff possession thereof would be contrary to the provisions of s. 7 of Act XVIII of 1873 (N.-W. P. Rent Act).

Held that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, *F* and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir*-land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and *F* and *W* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo* v. *Mcqueen* (1) referred to.

Per MAHMOOD, J., with reference to the effect of the execution-sale of November, 1876, in regard to the provisions of s. 7 of Act XVIII. of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H* who had proprietary rights in the mahál, and held the five biswas share of the *sir* as such (the word "*held*" as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage subject only to *H's* rights as an ex-proprietary tenant; that the rights of the purchaser of *H's* share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi* v. *Radha Kishan* (2) referred to.

Per TYRRELL, J., that in 1876, by reason of the execution-sale, the *sir* rights and interests of *H*, mortgaged by him in 1869, as such went out of existence, and

(1) 11 B. L. R., 46. (2) Weekly Notes, 1886, p. 74.

assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by *H's* vendees.

THE facts of this case were as follows:—In August, 1869, Fida Husain, Ata Husain, and Jamal Husain, sons, and Wahid-un-nissa, widow, of Ahmad Husain, deceased, were co-sharers in a moiety of a ten biswas share of a certain village, and Himayat Husain was the holder of the other moiety. The *sír*-land appertaining to this ten biswas share was 87 bighas. On the 2nd August, 1869, Ata Husain, Jamal Husain and Himayat Husain gave Karamat Khan, the plaintiff in this case, a usufructuary mortgage of the whole 87 biswas of this *sír*-land. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage money, and to receive the profits in lieu of interest. On the 17th April, 1872, Fida Husain, Wahid-un-nissa, Ata Husain and Jamal Husain, gave a usufructuary mortgage of their 5 biswas share together with a moiety of the 87 bighas of *sír*-land to Sami-uddin, Hidayat Ali, and Inayat Ali. In the deed of mortgage it was stated that half of the mortgage-money due to the plaintiff on the mortgage of the 2nd August, 1869, was due by the executants, and that they accordingly left the same with the mortgagees in order that they might redeem. On the 20th November, 1876, Himayat Husain's five biswas share with its *sír*-land was sold in the execution of a decree. The plaintiff, alleging that the mortgagees under the mortgage of the 17th April, 1872, and the purchasers under the execution-sale of the 20th November, 1876, had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sír*-land by virtue of his mortgage-deed of the 2nd August, 1869.

The Court of first instance gave him a decree for possession of the 87 bighas. On appeal, the lower appellate Court held that the plaintiff was not entitled to enforce his mortgage in respect of the share in the 87 bighas of land in suit of Fida Husain and Wahid-un-nissa, because these persons were not parties to the mortgage-deed. With regard to the *sír*-land appertaining to the 5 biswas share of Himayat Husain, the lower appellate Court held that from

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the date of the execution-sale of the 20th November, 1876, Himayat Husain became an ex-proprietary tenant of his *sir* land, and to give the plaintiff possession of such land would be to enforce a transfer prohibited by Act XVIII of 1873 (N.-W. P Rent Act). The Court therefore modified the decree of the first Court, by dismissing the plaintiff's suit in respect to the shares in the 87 bighas of land claimed of Fida Husain, Wahid-un-nissa and Himayat Husain.

The plaintiff appealed to the High Court on the grounds (i) that Fida Husain and Wahid-un-nissa were estopped from disputing the plaintiff's title as mortgagee to their shares of the mortgaged property; (ii) that the mortgage to him was executed by Ata Husain, Jamal Husain, and Himayat Husain for themselves and as agents of Fida Husain and Wahid-un-nissa, and (iii) that the share of Himayat Husain in the mortgaged property was still liable for the mortgage-debt.

Mr. *Amir-ud-din*, for the appellant.

Mr *J. Simeon*, for the respondents.

MAHMOOD, J.—I have been asked by my brothre Tyrrell to deliver judgment in this case, which, in consequence of the course that has been taken by the learned counsel for the appellant and the learned pleader for the respondents, and also in consequence of the manner in which the lower appellate Court has interfered with the first Court's decision, is not very simple. It is therefore advisable briefly to recapitulate the facts, to show what the real questions are which we have to determine in second appeal. It appears that certain property, over 87 bighas of *sir*-land, is situated in the village of certain co-sharers. Among others, one Kazi Ahmad Husain held *sir*-land in proportion to his 5 biswas share of the village, and Himayat Husain, who is said to have been related to Kazi Ahmad Husain, held in proportion to the other 5 biswas share of the zamindari. Upon the death of Ahmad Husain the *sir*-land, to the extent of his share, would devolve, according to the Muhammadan law, upon his sons Fida Husain, Ata Husain, and Jamal Husain and his widow Wahid-un-nissa. The devolution would be in certain proportions which it is unnecessary to describe It appears that on the 2nd August, 1869, Ata Husain, Jamal Husain, and Himayat

Husain executed a deed of usufructuary mortgage in favour of the present plaintiff, Karamat Khan, and it has been found that they placed him in the entire possession of the 87 bighas representing their *sir* in the village. It has been found that the mortgagee was placed in full possession of the whole area, and one difficulty in dealing with the case arises from the admitted fact that in that area were included the shares of Fida Husain and Wahid-un-nissa, whose names were not put to the mortgage-deed of the 2nd August, 1869. On the 17th April, 1872, Fida Husain and Wahid-un-nissa joined with Ata Husain in executing a usufructuary mortgage in favour of three persons named Sami-ud-din, Hidayat Ali and Inayat Ali—Hidayat Ali being now represented by his daughter Ali-un-nissa and his sister Nasib-un-nissa. Another circumstance which should be mentioned is, that on the 20th November, 1876, in the course of certain execution-proceedings, the zamindari rights of Himayat Husain, one of the mortgagors under the deed of the 2nd August, 1869, were sold by auction and were purchased by Wazir Khan, Amin-ud-din and Inayat Ali, who was one of the mortgagees under the deed of the 17th April, 1872. It has been found that it was not until October, 1879, that Karamat Khan, the plaintiff-appellant, who obtained possession as mortgagee under the deed of 1869, was dispossessed of the land by the various defendants upon various allegations of right and repudiations of his rights under that deed. The object of the present suit is to recover possession of all the lands comprised in the mortgage of 1869, and the parties impleaded as defendants are the executants of that mortgage, also Fida Husain and Wahid-un-nissa, also the mortgagees under the deed of 1872, also the purchasers of Himayat's rights at the auction-sale of the 20th November, 1876 The suit has been resisted upon various pleas which need not be described, except that Fida Husain and Wahid-un-nissa repudiated the mortgage on which the suit was brought, on the ground that they were not parties to it, and it was not binding on them This plea related only to a 2½ biswas share of the *sir*-land which is in suit. The other plea was that raised by Himayat Husain, who admittedly was a party to the mortgage of 1869, and whose rights had been sold in the auction-sale of the 20th November, 1876. The Subordinate Judge has decreed the whole suit, except certain money-claims,

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regarding mesne profits, which are not now the subject of appeal, and in reference to which no argument has been addressed to us. The various defendants appealed to the District Judge, and he, in a judgment which went fully into the facts, arrived at a conclusion which, in my opinion, is unsound in law. First, with reference to the 2½ biswas share of the *sir*-land which would be the share of Fida Husain and Wahid-un-nissa, he dismissed the claim on the ground that they were not parties to the mortgage of 1869. But it is clear from the findings of the Courts below, that at the time when that document was executed, Fida Husain and Wahid-un-nissa were aware of the transaction which made Karamat Khan the mortgagee, under the deed, of the whole property. It is also clear that, knowing this, they allowed the possession of Ata Husain, Jamal Husain and Himayat to appear as if covering the entire zamindari rights in the 10 biswas share of the *sir*. Under these circumstances this case appears to me to be one to which the equitable doctrine reproduced by s 41 of the Transfer of Property Act applies. That section runs thus :—" Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." This rule, which in principle is the same as that on which s. 115 of the Evidence Act is based, does no more than reproduce the *dicta* of the Privy Council in *Ramcoomar Koondoo* v *McQueen* (1) where their Lordships observed :—" It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if

(1) 11 B. L. R. at p. 52.

prosecuted, would have led to a discovery of it." Now the circumstances of this case furnish grounds for the application of this doctrine, and, so far, there is force in the argument of Mr. *Amir-ud-din* for the appellant, that the action of Fida Husain and Wahid-un-nissa, in allowing his clients to obtain a mortgage of the whole 10 biswas share of *sir*, amounted to making the mortgagee alter his position by the omission of these two persons, and that they cannot now turn round and say that at the time of the mortgage of 1869, the apparent parties to that transaction had no authority to mortgage the 2½ biswas. But the case does not rest here: for only three years after the deed of 1869 these two persons, Fida Husain and Wahid-un-nissa, executed a mortgage, dated the 17th April, 1872, in favour of strangers, a mortgage which, being usufructuary, would clash with the rights of Karamat Khan under the mortgage of 1869. It is unnecessary to consider the exact terms of that mortgage, but it contained a distinct statement by Fida Husain and Wahid-un-nissa that, although their names did not appear in the mortgage of 1869, yet they had mortgaged to him through or in the names of Fida Husain's brothers and Wahid-un-nissa's sons —Ata Husain and Jamal Husain. This deed further represents the amount of the money due in respect of their share as a charge which was to be paid off by the second mortgagee. This admission, so solemn and deliberate, not only shows that the second mortgagees of 1872 had notice of the prior mortgage of 1869, but is an admission, the best evidence in such cases, that the mortgage of 1869 was executed with the consent of Fida Husain and Wahid-un-nissa. It therefore appears that these two persons have no defence, either in law or equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the consequences of the lien of 1869.

Then, with reference to the 5 biswas share of zamindari rights in the *sir*, that is, of Himayat Husain, the question is what was the effect of the auction-sale of the 20th November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873. That is to say, did Himayat, by reason of those provisions, acquire any right of the nature therein described so as to prevent Karamat Khan from getting physical possession of the land now in suit, in derogation of the occupancy-right? Mr. *Amir-ud-din's* argument at first struck

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me as a plausible one. He contended that by the general rule of construction—*nova constitutio futuris formam imponere debet, non præteritis*—statutory provisions have ordinarily no retrospective effect. This, I concede; but the question is, does the rule apply to the present case? The argument is that Karamat Khan's rights were acquired under the deed of 1869; that he got actual possession of the land; and that, inasmuch as his rights originated in 1869, they cannot be vitiated by the Rent Act of 1873. Another rule is that where rights are taken away or impaired, the Court must place as strict a construction as they are in the habit of applying to penal statutes. This rule is discussed at pp. 160-161 of Wilberforce's work on *Statute Law* and in Maxwell *On the Interpretation of Statutes*, pp. 257-258. It does not, however, apply to the present case. In India, since 1859, the Legislature has interfered in the interests of the agricultural population, by giving tenants the right of occupancy. In Lower Bengal this has been done recently even in a more extensive sense, but in these Provinces it was first effected by Act X of 1859, and this was afterwards replaced by the Rent Act of 1873, which was in force when Himayat's proprietary rights in the zamindari mahal were sold. At that time there was no such ex-proprietary right as is provided by s. 7 of that Act, and is maintained in the present Act (XII of 1881). Now it is a rule of interpretation that when the Legislature changes the law, the change itself is an indication of the intentions of the Legislature, and is an element in the construction to be placed upon the later statute (Wilberforce, p 108). Applying this rule, and reading this section carefully, I am of opinion that the statute operates to a certain extent in derogation of the rights of Mr. *Amir-ud-din's* clients under the deed of 1869, and effects the advantages which he would otherwise derive thereunder. S. 7 is in the following terms:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants,' and shall have all rights of occupancy

tenants" It appears to me that the most important word in the section in connection with the present case is "hereafter." The statute was passed on the 22nd December, 1873. The rights of Himayat were sold on the 20th November, 1876, so there can be no doubt that Himayat, who had proprietary rights in the mahal in question, and held *sir* as such, did lose his proprietary rights, and therefore the case comes within the first portion of s. 7. The next important word is "held," which Mr. *Amir-ud-din* argues denotes actual possession. A short time ago, in the case *Tulshi* v. *Rudha Kishan* (1), the present learned Chief Justice laid down, with my concurrence, that the word "held" in this section must not be rigidly construed to refer to manual or physical holding, but land possessed and belonging to a person as his *sir*. I am glad to find that my brother Tyrrell approves of this interpretation. There can be no doubt that Himayat "held" the 5 biswas share of the *sir*. Then, the question is, what is the effect of this view of the law? Although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7, and by reason of the sale of the 20th November, 1876, the nature of his means of benefiting by the mortgage were necessarily changed. Neither the preamble nor s. 1 of the Act contains any saving clause which could justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one. If we were so to hold, in some cases where usufructuary mortgagees are in possession, no such rights as are created by s. 7 could come into existence for sixty years. Moreover, such mortgages may possibly never be redeemed; and if the fact that a mortgage, such as that of 1869 in the present case, is subsisting, were sufficient to prevent the operation of the statute, the result would be that the object aimed at by the Legislature would be defeated in respect of all *sir*-lands situate in villages which may at that time be in the hands of mortgagees. Such could not have been the intention of the Legislature, and I may add that the interpretation which I have placed is supported by the construction of similar phrases in English statutes, of which illustrations are given by Mr. Wilber-

(1) Weekly Notes, 1886, p 74.

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force at p. 165 of his work. In the result, I hold that Fida Husain and Wahid-un-nissa did mortgage their rights, or rather rendered their rights subject to the deed of 1869. Secondly, Himayat, by the operation of s. 7 of the Rent Act, became an ex-proprietary tenant of the land belonging to him at the time of the sale of the 20th November, 1876. Under these circumstances, the possession must be given to the plaintiff-mortgagee under the deed of 1869 of such rights as Himayat had at the time of the mortgage, subject to Himayat's right as an ex-proprietary tenant. So far as the purchasers of Himayat's share, under the sale of 20th November, 1876, are concerned, their rights are of course subject to the mortgage of 1869. Again, the rights of the mortgagees under the deed of 17th April, 1872, fall under the rule of the law of mortgage, which constitutes the essence of the rule of priority, and which has been best enunciated in s. 48 of the Transfer of Property Act. Here the mortgage of 1869, and that of 1872, being both usufructuary, the latter must give way to the incidents of the former. I would give effect to these views in the decree of this Court. The first Court gave a decree for possession without qualification as to the statutory rights of Himayat. The lower appellate Court modified the decree. I am of opinion that the decree of this Court should be that the appeal succeeds in part, the lower appellate Court's decree being reversed, and that of the first Court being restored, with this qualification, that the possession which the plaintiff will get under this decree will be subject to such ex-proprietary tenant rights as Himayat may have had in his portion of the *sir*-land. With reference to costs, we propose to exercise the discretionary power given to us by s. 220 of the Civil Procedure Code by apportioning the costs as follows :—The plaintiff will recover his costs in all Courts as against Fida Husain and Wahid-un-nissa to the extent of his claim against them. The decree as to costs in reference to the other defendants will be the same. As regards Himayat Husain, he and the plaintiff will respectively bear their own costs in all Courts, and, with reference to the costs of the other defendants, they will bear their own costs to the extent of their shares.

TYRRELL, J.—I agree that Musammat Wahid-un-nissa and her son Fida Husain, by their acts and omissions in 1869, as well as

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by their express admissions in 1872, have furnished sufficient grounds to justify the first Court's finding that they made themselves liable to the appellant in respect of the obligations and liabilities created by the persons who executed the mortgage to the appellant of 1869.

And, as to the question of the retrospective application of the rule of s. 7 of Act XVIII. of 1873, I doubt if it be really involved in this case. Himayat Husain mortgaged his *sir* in 1869, and in 1876, his *sir* rights and interests, as such, went out of existence under the operation of the law of 1873 and assumed a different character. Over that tenure in its altered character the appellant still has his mortgage charge; but he has not, in the existing state of the law, a right to physical possession of the actual land, which was formerly Himayat Husain's *sir*, but is now his occupancy tenure.

Subject to this new right of Himayat Husain, the appellant retains his mortgage charge of 1869 over the zamindari interests in this portion of the land acquired by Himayat Husain's vendee. But as the present claim of the appellant is for possession only, it is unnecessary to go further into this aspect of the question.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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JOKHU RAM AND OTHERS (JUDGMENT-DEBTORS) *v.* RAM DIN AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Civil Procedure Code, s. 230—Twelve years' old decree—Statute, construction of—General words—Retrospective effect.

The holder of a decree bearing date the 15th June, 1872, applied for execution thereof on the 9th February, 1885, the previous application being dated the 27th November, 1883.

Held that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraf Begam* v. *Ghalib Ali* (1) followed. *Goluck Chandra Mytee* v. *Harapriah Debi* (2), *Bhawani Das* v. *Daulat Ram* (3), and *Sreenath Gooho* v. *Yusoof Khan* (4) referred to. *Tufail Ahmad* v. *Sadhu Saran Singh* (5) discussed and dissented from by MAHMOOD, J.

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* Second Appeal No. 23 of 1886, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th February, 1886, reversing an order of Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 11th August, 1885.

(1) I. L. R., 6 All. 189.
(2) I. L. R., 12 Calc. 559.
(3) I. L. R., 6 All. 388.
(4) I. L. R., 7 Calc. 556.
(5) Weekly Notes, 1885, p. 193.

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Per MAHMOOD, J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.

THE decree of which execution was sought in this case was a decree for money bearing date the 15th June, 1872. The decree-holder applied for execution on the 9th February, 1885, the previous application being dated the 27th November, 1883. The Court of first instance held, relying on *Tufail Ahmad* v. *Sadho Saran Singh* (1), that the application was barred by limitation, under the provisions of s. 230 of the Civil Procedure Code, 1882. On appeal by the decree-holders the lower appellate Court held, with reference to *Musharraf Begam* v. *Ghalib Ali* (2), that the application, being the first which had been made under s. 230 of the Civil Procedure Code, 1882, after the decree became twelve years' old, was within time. The Court refused to follow *Tufail Ahmad* v. *Sadho Saran Singh* (2), as that case was, in its opinion, opposed to *Musharraf Begam* v. *Ghalib Ali* (1), which was a decision of the Full Bench.

The judgment-debtors appealed to the High Court.

Mr. *C. H. Hill* and Munshi *Hanuman Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

OLDFIELD, J.—This is an appeal against the order of the lower appellate Court granting an application to execute a decree dated the 15th June, 1872. Applications for executing the decree had been made and granted at numerous dates down to that dated the 27th November, 1883, and the application of the 9th February, 1885, which is the subject of this appeal.

(1) Weekly Notes, 1885, p. 193 (2) I. L. R., 6 All. 199.

The lower appellate Court has held, following the Full Bench decision of this Court—*Musharraf Begam* v. *Ghalib Ali* (1)—that this last application is not barred by s. 230 of the Civil Procedure Code.

It is clear that the present application of the 9th February, 1885, was made after the expiry of twelve years from the date of the decree, and after twelve years from all the dates mentioned in s. 230. The last paragraph of this section, giving it the interpretation of the Full Bench ruling referred to, cannot be a bar to the application, because it was made within the three years from the coming into operation of the present Code; and though the application would be barred by s 230 of Act X of 1877, yet that section, under the Full Bench ruling, is not applicable. Under these circumstances the order of the lower appellate Court must be upheld, and this appeal, as well as Nos. 22, 24, and 25 of 1886, must be dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusion as my brother Oldfield, and sitting here as a Division Bench of the Court, we have no alternative but to follow the decision of the majority of the Judges in the Full Bench case of *Musharraf Begam* v. *Ghalib Ali* (1). I was not a party to that ruling, and I should probably find it difficult to agree with the prevailing opinion in that case, for I have long entertained views which are in accord with those expressed by my brother Oldfield in his dissentient judgment in that case. Those views have since been unhesitatingly accepted by a Division Bench of the Calcutta High Court in *Goluck Chandra Mytee* v. *Harapriah Debi* (2); but, as I said before, I am not at liberty to form my own opinion upon the matter on account of the opinion of the majority in the Full Bench case. Soon after that ruling, however, I had occasion in *Bhawani Das* v. *Daulat Ram* (3) to draw a distinction between the Full Bench ruling and cases in which the decree had already become barred, and, as such, incapable of execution, before the Civil Procedure Code of 1882 became law. That ruling has since been followed in many cases. That ruling, however, does not apply to this case, because the decree here had not become

(1) I. L. R., 6 All. 189 (2) I. L. R., 12 Calc. 559.
(3) I. L. R., 6 All. 388

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incapable of execution before the present Civil Procedure Code.

The decree with which we are concerned was passed on the 15th June, 1872, and calculating twelve years from that date, it was alive when the present Civil Procedure Code came into operation. After numerous executions, an application for execution was made on the 27th November, 1883, which was granted under the present Code, and the present application was made on the 9th February, 1885, that is, more than twelve years after the decree, but within three years of the passing of the present Code. The question then is, whether, under such circumstances, the execution of the decree is barred; and the question must be answered in the negative with reference to the Full Bench ruling above cited. The exact effect of that ruling is twofold:—

First—that the phrase "the law in force immediately before the passing of this Code" in the proviso to s. 230 of the present Code does not include the limitation provisions of s. 230 of the Civil Procedure Code of 1877.

Secondly—that the holder of a decree which was not more than twelve years old when the present Code was passed is entitled, under the proviso, to have, after the decree has become older than twelve years, "one opportunity, and only one, to execute it, whether he succeeds in obtaining satisfaction of it or not."

For this second point the learned Judges of the majority of the Full Bench relied upon the ruling of the Calcutta High Court in *Sreenath Gooho* v. *Yusoof Khan* (1), and I understand the effect of this to be that execution of a decree older than twelve years can be "granted" only once under the proviso to s. 230 of the present Code.

Now, I need say nothing as to whether, speaking for myself, I am prepared to except either of these conclusions, for, as I said before, it is my duty to apply them to the present case. Then what we have here is that the decree of the 15th June, 1872, was less than twelve years old when the present Code came into operation, and it became twelve years old on the 15th June, 1884, and is not affected by the twelve years' rule contained in s. 230

(1) I. L. R., 7 Calc. 556.

of the Code of 1877. Then the present application for execution, being dated the 9th February, 1885, is the first application made after the decree became older than twelve years, and must be entertained as the only opportunity to execute his decree, which must be allowed to the decree-holder, within the second conclusion of the Full Bench ruling as already indicated by me.

I should have ended my observations here but for the circumstance that a case has been cited by the learned pleader for the appellant as favouring his contention, and it does support his contention. It is the case of *Tufail Ahmad* v. *Sadhu Saran Singh* (1), which, I frankly confess, has caused me no small amount of surprise. In that case Petheram, C.J., laid down a rule of law which is in conflict not only with the Full Bench ruling in *Musharraf Begam's Case* (2) and my ruling in *Bhawani Das* (3), but also with some of the most important rules of interpretation which have always been adopted by the Courts of Justice, whether in England or in India. A profound respect for so learned and eminent an authority forces me to examine carefully this ruling, in order to ascertain whether I can possibly adopt the *ratio decidendi* upon which it proceeded. The learned Chief Justice in that case observed :—

"It appears that the decree sought to be executed was passed on the 15th September, 1870, and the present application for execution was made on the 14th March, 1884. From these figures it is clear that the application for execution was made after the expiration of twelve years from the date of the decree. Now, s. 230 of the Civil Procedure Code provides that no application for execution of the decree shall be granted after the expiration of twelve years from the date of the decree. The present application would be barred by s. 230, unless it came within the proviso to that section. That proviso is to the effect that, 'notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of the Code shall have expired before the completion of the said three years.' Now the

(1) Weekly Notes, 1885, p. 193. (2) I L. R., 6 All. 189.
(3) I L. R., 6 All. 388.

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meaning of this rule is that inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years' rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree."

So far I concur with the learned Chief Justice; but then he goes on to say what seems to me inconsistent with the passage which I have already quoted from his judgment. He goes on to say:—"This proviso applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230. Now the Code came into force in June, 1882, and the decree-holder could have availed himself of the three months up to September, 1882, when the twelve years expired. Under these circumstances the proviso is inapplicable, and the execution of the decree is barred by limitation. The Full Bench ruling brought to our notice is not applicable to the point which arises in this appeal."

Now, I am anxious to see what this passage actually enunciates. It may be summarized thus:—

First—that the proviso to s. 230 is confined to decrees which would be barred by the twelve years' rule "on the date of the Code *coming into force;* that is, on the 1st June, 1882 (*vide* s. 1 of the Code);

Secondly—that the proviso does not apply to, or benefit, decrees which would be not so barred;

Thirdly—that in the case of the latter class of the decrees, all the period that they would be entitled to for execution, is the remaining portion of the twelve years upon the Code *coming into force;*

Fourthly—that by the application of these rules in the case before the learned Chief Justice, the decree-holder was entitled to only three months after the Code came into force; and

Fifthly—that the case before him was distinguishable from the Full Bench ruling of this Court in *Musharraf Begam* v. *Ghalib Ali* (1).

Now, if this enunciation of the law is sound, there can be no doubt whatever that the appellant in this case must succeed; because, with reference to the first two points of the ruling of Petheram, C.J., the proviso to s. 230 would not benefit the decree, it being less than twelve years old when the Code came into force; and with reference to the third and fourth points of that ruling, the respondent here could execute his decree only up to the 15th June, 1884, when it became twelve years old; and it would therefore follow that the execution sought to be obtained on the 9th February, 1885, would be barred by the twelve years' rule. But I respectfully think that all the various points laid down in that ruling are erroneous and opposed to all that has ever been ruled as to the meaning of s. 230 of the Code. I know that this is a strong statement to make in respect of the judgment of so distinguished a legal authority as Petheram, C.J., and the deference due to him from the Court of which he was till lately the Chief Justice requires that I should, with due respect, explain my reasons more fully than would otherwise be necessary. I will therefore take each of the points ruled by Petheram, C.J., in the order in which he ruled them, and in which I have stated them.

Taking the first and second points then, I have to ask what reason is there for holding that the phrase "*any decree*" which occurs in the proviso to s. 230 of the Code is limited to decrees older than twelve years, and does not include decrees less than twelve years' old? The expression is, as I understand the English phrase, a general one, and to use the words of Mr. Wilberforce in his excellent work on *Statute Law* (p. 172), "it is clear that a limited meaning can only be given to general words, where the Act itself, or the legitimate methods of interpreting it, show that such was the intention of the Legislature." Again, Sir William Grant says in *Beckford* v. *Wade* (2):—"General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary

(1) I. L. R., 6 All. 189. (2) 17 Ves., at p. 91.

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addition or retren chment." Again, we have the *dictum* of Lord Chief Justice Cockburn in *Twycross* v. *Grant* (1) :—" I take it to be a sound canon of construction in the application of a statutory enactment that full effect should be given to general terms, unless from the context, or other provisions of the statute, a limitation on the general language must necessarily be implied, more especially when had such a limitation been intended it might reasonably have been expected to be expressed." And further authority upon the same point which Mr. Wilberforce quotes is the judgment of Williams, J., in *Garland* v. *Carlisle* (2), where the learned Judge observes :— " When the words of the Act are general and comprehensive and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice which must inevitably ensue from such a construction, can authorize Courts of Law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference or varying by interpretation but to a certain extent recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself?"

Such, then, being the undoubted rule of construction, there must be some reasón to be found in the Code itself which would justify limiting the general expression "*any decree*" only to "those decrees which would be *barred* on the date of the Code *coming into force*." Petheram, C J., in so restricting the meaning of the general phrase, has not stated any reasons, and speaking for myself, I fail to discover any in the Code. On the contrary, the legislative policy, upon which clauses such as the proviso to s. 230 are based, suggests no such restriction. " If the Legislature of a State should pass an Act by which a *past* right of action shall be barred, and without any allowance of time for the institution thereof *in future*, it would be difficult to reconcile such an Act with the express constitutional provisions in favour of the rights of private property. So if in a State, where six years, for instance, may be pleaded in bar to an action of *assumpsit*, a law should be passed declaring that contracts already in existence, and not barred by the statute, should be construed to be within it, such law, with-

(1) L. R., 2 C. P. D., at pp. 530, 531. (2) 4 Cl. and Fin. at p. 726.

out doubt, would be deemed unconstitutional" (Angell on Limitation, (4th ed.) p. 17). No wise Legislature ignores these fundamental principles of legislation, and we have in India another illustration of their application in the saving-clause in s. 2 of the Limitation Act (XV of 1877), in regard to suits for which the period prescribed by the Act is shorter than that prescribed by the superseded Limitation Act, 1871. Now, it is perfectly clear from the very nature of such saving-clauses, that the object of the Legislature is to prevent a sudden disturbance of existing rights in consequence of the new legislation, and to achieve that object the Legislature, in altering the law, allows a period of grace within which existing rights may be enforced without being affected by the new law. In other words, during the period of grace so allowed, the operation of the new law is suspended, so far as it would operate in derogation of existing rights, and the law having given due notice of the change, expects those whose rights would be adversely affected to enforce those rights before the period of grace expires. But it is necessarily beyond the object and scope of such saving-clauses to revive rights or remedies which have already expired and become defunct before the new Act comes into operation. That the Legislature may so revive rights and remedies is undoubtedly true, but the general rule is contained in the maxim of construction: "*Nova constitutio futuris formam imponere debet, non præteritis,*" and an equally well-recognised rule of construction requires express words in statutes before they can be construed as taking away existing rights, or reviving those which have already expired before the new enactment comes into operation. No such express words exist in the proviso to s. 230 as would have the effect of reviving barred decrees, and it was upon this principle that my ruling in *Bhawani Das* v. *Daulat Ram* (1) proceeded. The ruling of Petheram, C.J, however, lays down the very opposite doctrine, because, according to him, the "proviso benefits only such decrees as would be *barred* on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date men-

(1) I. L. R., 6 All. 688.

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tioned in s. 230." This amounts to saying that decrees which were already barred under the Code of 1877 were revived by the new Code—a conclusion which, in the absence of express words in the Code, I am unable to accept.

I now proceed to consider whether I can accept what I have enumerated as the third and fourth points of the learned Chief Justice's ruling. Now, I must observe, in the first place, that the Full Bench ruling of this Court in *Musharraf Begam* v. *Ghalib Ali* (1), which the learned Chief Justice was bound to follow as much as I am, leaves us no room for holding that the phrase "law in force immediately before the passing of this Code" had any reference to the limitation provisions of s. 230 of the Code of 1877, which provided, for the first time in the Indian law, a period of twelve years as the duration for execution of decrees. This being so, I entirely fail to understand how any decrees coming within the purview of the proviso could be restricted to twelve years from this date, if the twelve years expired before the completion of the three years' grace allowed by the proviso. But, as I have already said, the view of the learned Chief Justice was, that the proviso applied only to decrees older than twelve years; and inasmuch as the decree before him—to use his own words—was one of "those decrees which were not barred by the twelve years' rule when the Code came into force," he held, in logical consistency with this view, that the decree before him could be executed only during the three months intervening between the date "when the Code came into force" and the date "when the twelve years expired" But I confess I find it difficult to understand how these *three months* allowed in the case can be reconciled with the *three years* to which the learned Chief Justice referred in an earlier part of the judgment, when he said:—"That inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years' rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree." Indeed, the only way to reconcile the various portions of the learned Chief Justice's judgment seems to be to say that he held that, whilst a decree, which would be barred by the twelve years' rule on the

(1) I. L. R., 6 All. 189.

passing of the Code, would have the benefit of the proviso to s. 230, and would thus be entitled to a further period of full three years for the purposes of execution, a decree which, on that date, was eleven years, eleven months, and twenty-nine days old, would be allowed only one day for execution. I have put the matter in this strong light because such, indeed, is the effect of the ruling which I am now considering. How the learned Chief Justice distinguished the case before him from the Full Bench ruling of this Court is a matter upon which his judgment is totally silent, and, speaking for myself, I am wholly unable to see any distinction. And this is all I wish to say upon what I have enumerated as the fifth point of the learned Chief Justice's judgment.

But I must add that I have regarded it as my duty to consider the ruling in *Tufail Ahmad* v. *Sadhu Saran Singh* (1), not only out of the deference which is due by this Court to its late learned Chief Justice, but also because, if I had felt disposed to follow that ruling, I should have asked my learned brother Oldfield to allow this case to go before the Full Bench. But, for the reasons which I have already stated, I respectfully decline to regard the ruling either as sound law in itself or as consistent with the Full Bench ruling which we are bound to follow. My order then is the same as that of my brother Oldfield.

Appeal dismissed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

1886 *May* 20.

SACHIT AND ANOTHER (DEFENDANTS) v. BUDHUA KUAR (PLAINTIFF)*

Hindu widow—Decree against widow—Fraud—Reversioner.

Upon the death of *R*, a Hindu, who was separate from his brother *S*, his widow *G* became life-tenant of his estate, and his daughter *B* became entitled to succeed after *G*'s death. In 1882, a suit was brought by *S* and *G* against *V*, to recover the value of a branch of a mangoe tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that *R* was not the owner of the grove, nor was *G* the owner In 1885 *B* brought a suit against *G*, *S*, *V* and *A*, to whom *V* had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in

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* Second Appeal No 1598 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Azamgarh, dated the 20th June, 1885, reversing a decree of Munshi Sheo Sahai, Second Munsif of the city of Gorakhpur, dated the 11th January, 1885.

(1) Weekly Notes, 1885, p. 193.

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collusion between *S* and *G* on the one hand and *V* on the other, for the purpose of improperly preventing her from asserting her rights.

Held that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though *S* might have been improperly joined as plaintiff, any decision then passed against *G* would be binding upon the present plaintiff, and estop her again litigating questions which were then decided.

Held also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be reopened, the decision in that suit would not be binding on the plaintiff under the circumstances.

Held also that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon this form of plaint.

Katama Natchiar's Case (1), *Adi Deo Narain Singh* v. *Dukharan Singh* (2), and *Sant Kumar* v. *Deo Saran* (3), referred to.

THE plaintiff in this case was the daughter of one Ramphal Pande, deceased, and his wife Gulabi Kuar. She alleged in her plaint that her father always lived separately from his brother Salik Ram; that he died about seven years before the institution of the suit, and on his death Gulabi Kuar came into possession of his property; that Ramphal owned and possessed a certain grove of mangoe trees with which Salik Ram and one Sachit had no concern, that the plaintiff's mother and Salik Ram, having colluded with Sachit, brought a suit against the latter for the grove and caused a decision to be passed against themselves, in default of prosecution, on the strength of which Sachit had wrongfully taken possession of the grove in July, 1882; that Sachit had sold some trees to one Ramphal Kuar; that the plaintiff was heir to Ramphal Pande and, as Gulabi Kuar was not in possession of the grove, was entitled to possession thereof; and that her cause of action arose in June, 1883, when she became aware of what had happened. On these allegations she claimed a declaration of her right and possession of the grove, making Gulabi Kuar, Salik Ram, Sachit and Ramphal Kuar defendants to the suit.

The defendants Sachit and Ramphal Kuar defended the suit on the ground that the grove belonged to Sachit and not to Ram-

(1) 9 Moo. I. A. 543. (2) I. L. R., 5 All. 532.
(3) *Ante*, p. 365.

phal Pande, and on the ground that the question whether it belonged to Sachit or Ramphal Pande had became *res judicata* by reason of the decision passed against the plaintiff's mother in the suit referred to in the plaint.

It appeared that that suit was brought by Gulabi Kuar and Salik Ram against Sachit, and the claim was to recover the value of a branch of a mangoe tree wrongfully taken by Sachit and for maintenance of possession over the grove. That suit was dismissed by the Court of first instance on the 8th February, 1882, and the decree was affirmed by the appellate Court on the 8th July, 1882. It was decided in that suit that the plaintiff's father was not the owner of the grove, nor was Gulabi Kuar the owner.

The Court of first instance held that the plaintiff's suit was barred by the decision in the former suit. On appeal by the plaintiff the lower appellate Court held that the suit was not barred by that decision, on the ground apparently that the same had not been fairly obtained against Gulabi Kuar the plaintiff's mother; and, finding that the grove belonged to Ramphal Pande, gave the plaintiff a decree declaring her right, but refusing to give possession on the ground that the plaintiff's mother was still alive.

The defendants Sachit and Ramphal Kuar appealed to the High Court on the ground (i) that the suit was barred by s. 13 of the Civil Procedure Code; (ii) that the plaintiff was bound by the acts of her mother and could not question the same; and (iii) that the plaintiff's claim for a declaratory decree while her mother was alive was not maintainable, and the decree given her was bad.

Mr. *J. E. Howard* and Lala *Lalta Prasad*, for the appellants.

Shah *Asad Ali*, for the respondent.

STRAIGHT, Offg. C. J.—This is an appeal preferred by the defendant Sachit under the following circumstances:—The suit was brought by the plaintiff-respondent to recover possession of a grove from the defendant by a declaration of the plaintiff's title as reversioner, on the allegation that Sachit had made a sale of certain trees to the second defendant Ramphal Kuar. The plaintiff was the daughter of one Ramphal Pande, who died seven years ago, leaving a widow, Gulabi Kuar, a brother, Salik, and a daughter,

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who is the plaintiff in this case. Ramphal was separate from his brother Salik, and his estate therefore was inherited, first, by his widow Gulabi Kuar, who became life-tenant, and the plaintiff is entitled to succeed to the estate upon her mother's death. In 1882 a suit was brought by Salik and Gulabi Kuar against Sachit for declaration of right and possession of the grove to which the present suit relates, and, apparently after contest, the suit was decreed in favour of Sachit, and the claim of Salik and Gulabi Kuar was dismissed. If that was a genuine suit and was properly contested by the then plaintiffs, though Salik may have been improperly joined as plaintiff, still any decision then passed against Gulabi Kuar would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. The authority for this view is the case of *Katama Natchiar* (1), and the portion of the judgment in that case to which I more particularly refer, will be found at page 608 of the report. The same principle was also recognized by myself in *Adi Deo Narain Singh* v. *Dukharan Singh* (2). The plaintiff now comes into Court impeaching a transfer of certain trees by Sachit to the other defendant, Musammat Ramphal Kuar, and is met by Sachit with the plea that the question of proprietary title to the grove has already been determined by the suit of 1882 against Gulabi Kuar, the decision of which is binding upon the plaintiff and she cannot re-open it now. The Munsif was of opinion that this plea was good. The Subordinate Judge took a contrary view. But it appears to me that in doing so he has stated very inadequate grounds for his conclusions, and has also lost sight of the real nature of the plaintiff's claim and the language of the plaint. He has apparently not noticed the most essential point in the plaint, namely, that the plaintiff alleges that the proceedings of 1882 were fraudulent and collusive, and were got up between Salik and Gulabi on the one hand and Sachit on the other, and carried on for the purpose of improperly preventing the plaintiff from asserting her rights. This is a specific allegation of fraud and collusion; and if it is established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the present plaintiff under the circumstan-

(1) 9 Moo. I. A., 543. (2) I. L. R., 5 All. 532.

ces I have mentioned. This being so, it appears to me that the Judge has not tried the two main issues, which must be clearly determined before it is possible for us to dispose of this appeal. Before remanding these issues to the lower Court under s. 566 of the Civil Procedure Code, I may observe that, in my opinion, the principle which I enunciated in the case of *Adi Deo Narain Singh* v. *Dukharan Singh* (1) should be applied to the present claim ; and if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she will be entitled in this suit to claim, not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant. It appears to me that we are competent to give such relief upon this form of plaint. I would therefore remand the following issues for determination by the lower appellate Court under s. 566 of the Code :—

1. Did the suit of 1882 finally determine the question of the proprietary title to the grove now in suit between Gulabi Kuar and the present defendant Sachit?

2. Was such suit a genuine and *bonâ fide* proceeding, contested and litigated honestly from beginning to end?

The findings, when recorded, will be returned to this Court, with ten days allowed for objections from a date to be fixed by the Registrar.

MAHMOOD, J.—I am of the same opinion. It appears to me that the case cannot be disposed of finally without ascertaining the two points which the learned Chief Justice has just formulated. The main point would be the conduct of Gulabi Kuar in the litigation of 1882; and whether her action was induced by collusion or other fraudulent motives, or by undue influence, the result would be the same. As regards the rule applicable to cases of this kind, I may refer to the judgment in *Sant Kumar* v. *Deo Saran* (2) in which the ruling of the Privy Council, to which the learned Chief Justice has referred, was applied. I also agree with what the learned Chief Justice has said in reference to the nature of the plaint in this case.

Issues remitted.

(1) I. L. R., 5 All. 532. (2) *Ante*, p. 365.

1886
June 1.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

MUHAMMAD HASAN (PLAINTIFF) *v.* MUNNA LAL AND ANOTHER (DEFENDANTS)*

Pre-emption—Wajib-ul-arz—Evidence of contract and custom—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 91—Regulation VII of 1822, s. 9, cl. (i).

The *wajib-ul-arz* of a village is a document of a public character prepared with all publicity, and must be considered as *primâ facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the share holders. Looking to the public character of the document, and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul arz* was not binding on the vendor defendant, as that document did not bear his signature, and the lower appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

Held that the lower appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to it entries, both as proof of the contract as well of custom, was very strong. *Isri Singh* v. *Ganga* (1) referred to.

THE plaintiff in this case sued to enforce the right of pre-emption in respect of the sale of a piece of *muafi* land situate in Kasba Koil, zila Aligarh. The vendor defendant acquired the property by purchase at an execution-sale on the 24th August, 1871, and he sold it to the vendee-defendant by a deed dated the 24th June, 1883. The plaintiff was a co-sharer in the mahal, and he claimed on the basis of contract and custom, as evidenced by the following entry in the *wajib-ul-arz* :—" Every sharer may transfer his share as he pleases, but he must offer it to the sharers of his own family; then

* Second Appeal No. 1233 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 31st July, 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 18th September, 1884.

(1) I. L. R., 2 All. 876.

to other sharers; and if these all refuse, he may transfer it to any one he pleases."

The defendants set up as a defence that the *wajib-ul-arz* was not binding on them, as it had not been attested by the vendor, and that the custom of pre-emption did not exist in Kasba Koil, the vendor denying its existence absolutely and the vendee as affecting *muafi* land. The Court of first instance dismissed the suit, holding that the entry in the *wajib-ul-arz* relating to the right of pre-emption did not apply to *muafi* land, and that even if it did, the entry was not binding on the vendor and vendee, as the vendor had not signed the *wajib-ul-arz*. On appeal by the plaintiff, the lower appellate Court held that the entry was not binding on the vendor and vendee as an agreement by the former, as it was not signed by the former, and that the custom of pre-emption in Kasba Koil had not been proved. It was of opinion that, as regards custom, there was no presumption as to the truth of the entry, such as s. 91 of Act XIX. of 1873 (N.-W. P. Land Revenue Act) created in respect of such entries, inasmuch as the *wajib-ul-arz* in question had been framed before that Act came into force. On this part of the case it observed as follows:—

"The entry in the *wajib-ul-arz* is no doubt a pretty strong piece of evidence in proving the existence of the custom; but it was drawn up and attested in 1872, before Act XIX. of 1873 came into force. Some witnesses have deposed in general terms that the custom of pre-emption exists in the mahal, but no specific instances have been given in which the custom has been acted on or asserted.

"The inevitable conclusion seems to be that the custom is not proved, unless it can derive assistance from s. 91, Act XIX. of 1873, or some corresponding clause in the corresponding enactment which was in force when the record-of-rights was drawn up. A reference to the official settlement report shows that the settlement of the Aligarh district which is now current began from 1868. The operations were begun shortly after that date and the enactment on the subject then in force was Regulation VII. of 1882. This enactment, by s. 9, cl. (i), directed the officer who was making the settlement to make a detailed investigation,

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and draw up a record of the landed tenures, rights, interests and privileges of the various classes of the agricultural community. The section goes on to specify the heads of information required, and then enacts that the information be so arranged as to admit of an immediate reference by Courts of Judicature, it being understood and declared that all decisions *on the demands of zamindars* shall be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, &c. This section seems not wide enough to cover the present claim. The object of the section is clearly to fix and determine the right of zamindars and *tenants*, and the record is not *per se* sufficient to make the entry in it conclusive proof of the existence of a custom of pre-emption.

"It remains to consider whether the entry can derive any confirmation from s. 91, Act XIX. of 1873. The record was drawn up and attested in 1872, and the officers which drew it up were acting under Regulation VII. of 1822. The settlement was not reported to the Board of Revenue for sanction till 1874, and was not confirmed by the Government till a later date. But when confirmed it took effect from 1868, the year in which the former settlement expired. This record must be taken to be prepared under Regulation VII. of 1822, and cannot derive force or validity from an enactment which came into force after it was drawn up."

The plaintiff appealed to the High Court on the ground (i) that the *wajib-ul-arz* was binding on all co-sharers, and among them on the vendor, and the fact that it was prepared before Act XIX. of 1873 was passed did not affect the question; (ii) that the indorsement on the *wajib-ul-arz* by the settlement officer showed that it was attested by all the co-sharers, and it was for the respondent to show that he had not attested it; and (iii) that the vendor had acquiesced in the terms of the *wajib-ul-arz* for fourteen years, and was thereby precluded from objecting to the term thereof.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

OLDFIELD, J.—This suit has been brought to enforce a right of pre-emption in respect of certain property sold by the defendant Baldeo Das to the defendant Munna Lal. The suit has been dismissed in the Court of first instance, and that dismissal has been

affirmed by the lower appellate Court. The suit is based on contract and custom as evidenced by the *wajib-ul-arz;* and the only ground on which the lower Courts have dismissed the suit is, that any contract which may be founded on the *wajib-ul-arz* is not binding on the vendor-defendant, as it does not bear his signature; and so far as the *wajib-ul-arz* was relied on as proof of the custom of pre-emption, the Judge attached no weight to it, because it was drawn up when Regulation VII. of 1822 was in force, and at that time there was no legal presumption of its accuracy. He dismissed the plaintiff's claim on the ground that the evidence adduced by him did not prove that pre-emption existed in the village by custom. The Judge appears to me to have erred in dealing with the evidence. Although this particular *wajib-ul-arz* was made before Act XIX. of 1873 came into force, yet the weight which should attach to its entries, both as proof of the contract as well as the custom is very strong, and the observations made by this Court on this subject in the Full Bench case of *Isri Singh* v. *Ganga* (1) are as applicable here as in that case. The *wajib-ul-arz* is a document of a public character, prepared with all publicity, and must be considered as *primâ facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence so as to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of this document and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character. The grounds, therefore, on which the Judge disposed of the appeal before him are not valid. He must re-try the question of the binding effect of this *wajib-ul-arz*, both as to contract and custom as regards pre-emption, and also the other issues that arise.

The case is therefore remanded for re-trial. The costs of this appeal will abide the result.

TYRRELL, J.—I concur.

Case remanded.

(1) I. L. R., 2 All. 876.

1886
June 16.

FULL BENCH.

Before Mr. Justice Straight, Offg Chief Justice, Mr. Justice Bredhurst, Mr. Justice Oldfield, Mr. Justice Tyrrell and Mr. Justice Mahmood.

AMANAT BEGAM AND ANOTHER (PLAINTIFFS) *v.* BHAJAN LAL AND OTHERS (DEFENDANTS) *

Mortgage—Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—Valuation of suit—"Subject-matter in dispute"—Act VII of 1870 (*Court-Fees Act*), *s* 7, *art.* ix—*Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 20—*Statute, construction of.*

A deed of mortgage was executed by *P*, *T* and *S* for Rs. 4,000. *A*, the purchaser of the share of *S*, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of *P* and *T* the other mortgagors.

Held by the Full Bench with reference to s. 7, art. ix of the Court-Fees Act (VII of 1870), that the defendants mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one third of the original mortgage amount, namely, Rs 1,333-5 4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo* v. *Nagvekar* (1) referred to.

Held also, with reference to the terms of s 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333 5 4, the one third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction.

Per MAHMOOD, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

THIS was a reference to the Full Bench by Petheram, C. J, and Straight, J. The facts of the case were as follows:—

The plaintiffs sued to recover possession of certain property which had been mortgaged by a deed dated the 1st September,

* Second Appeal No. 801 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 21st February, 1885, reversing a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 23rd December, 1884.

(1) I. L. R., 6 Bom 324.

1863. It appeared that three persons named Pan Kuar, Takht Singh, and Maidan Singh, on the 1st September, 1863, mortgaged one-third of the 20 biswas of a village called Mau for Rs. 4,000, for a term of five years. The mortgage deed provided *inter alia* that the profits should, during the term of the mortgage, be appropriated in payment of Rs. 1,000 of the principal money, and the mortgagors should be entitled to redeem at the end of the term on payment of Rs. 3,000. Three persons named Mohan Singh, Chandan Singh, and Dharam Singh became the mortgagees of the property by virtue of a decree for pre-emption. Subsequently to this the rights of these persons under the mortgage were sold to persons named Gopi, Sham Sundar, Ram Prasad, Bhola Nath, and Makund Ram. Ram Prasad, Bhola Nath, and Makund Ram then purchased the equity of redemption of two of the mortgagors, Pan Kuar and and Takht Singh, and on the 13th January, 1884, the third mortgagor, Maidan Singh, sold his equity of redemption to the plaintiffs. The plaintiffs brought the present suit against the heirs of Ram Prasad and Makund Ram, and Gopi, Sham Sundar and Bhola Nath, to recover one-third of the mortgaged property, that is to say, the 2 biswas 4 biswansis and 7 kachwansis share of Maidan Singh, on payment of Rs. 1,000, one-third of the principal money due at the end of the mortgage-term. The suit was instituted in the Court of the Munsif of Bisauli, zila Sháhjahánpur. The plaintiffs paid an *ad valorem* court-fee on Rs. 1,000 in respect of the plaint. The defendants set up as a defence, amongst other things, that, having regard to the principal amount secured by the mortgage, that is to say, Rs. 4,000, the suit was not cognizable by the Munsif. The Munsif held that as the plaintiffs claimed to redeem on payment of Rs. 1,000, the suit was cognizable by him, and in the event gave the plaintiffs a decree. On appeal by the defendants the Subordinate Judge of Sháhjahánpur held that the suit was not cognizable by the Munsif, the value of the subject-matter of the suit being Rs. 1,333-5-4, one-third of Rs. 4,000, the principal amount secured by the mortgage; and he also held that such value was the value for the purposes of the Court-Fees Act (VII of 1870), s. 7, art ix, and the plaint was insufficiently stamped. He made an order directing the plaint to be returned to the plaintiffs to be presented to the proper Court.

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The plaintiff appealed to the High Court, contending that the suit had been properly valued at Rs. 1,000, one-third of the principal money due at the end of the mortgage-term, both for the purposes of jurisdiction and court-fees.

The appeal came for hearing before Petheram, C. J., and Straight, J., who referred the following questions to the Full Bench :—

"(i) Had the Munsif jurisdiction to hear and determine the suit? and

(ii) On what amount should the court-fees be calculated both in the Court of first instance and in the Court of appeal?"

Pandit *Nand Lal*, for the appellants.—The amount secured by the mortgage-deed is Rs. 3,000, and as the suit relates to one-third of the mortgaged property, it must be taken that one-third of that amount, namely, Rs. 1,000, is the amount secured, within the meaning of s 7, art. ix., Court-Fees Act—*Balkrishna Dhondo* v. *Nagvekar* (1). For the purposes of jurisdiction, the value of the subject-matter in dispute is also Rs. 1,000. The subject-matter in dispute is the mortgage-debt and the mortgagee's right which is sought to be paid off, which is Rs. 1,000. He cited *Gobind Singh* v. *Kallu* (2), *Bahadur* v. *Jawab Jan* (3), *Kubair Singh* v. *Atma Ram* (4), *Cotterell* v. *Stratton* (5), *Krishnanna Chariar* v. *Srinivasa Ayyangar* (6).

Pandit *Ajudhia Nath* (with him, Babu *Ratan Chand*), for the respondents.—The mortgage is a joint one, and the principal amount secured by it is Rs. 4,000, and court-fees should be paid on the whole of that amount—*Umar Khan* v. *Mahomed Khan* (7). If the "subject-matter in dispute" is the mortgage-money, it is the whole amount of the mortgage-money. In a suit for redemption the subject-matter in dispute is the property itself, and not the amount is respect of which redemption is claimed.

STRAIGHT, Offg. C. J.—(After stating the facts and the questions referred to the Full Bench, continued)—These questions have been argued before the Full Bench in inverse order, and it

(1) I. L. R., 6 Bom. 326.
(2) I. L. R., 2 All. 778.
(3) I. L. R., 3 All 822.
(4) I. L. R., 5 All. 322.
(5) L. R., 17 Eq., 543.
(6) I. L. R., 4 Mad. 339.
(7) I. L. R., 10 Bom. 41.

will therefore be most convenient to deal with them in the order in which they have been argued by the learned pleader for the appellants. The first contention urged by the learned pleader is as to the construction to be placed on the instrument of the 1st September, 1863, which he urges was only a mortgage for Rs. 3,000. We have had, by the assistance of my brother Mahmood, the advantage of hearing a literal English translation of the language of the instrument in question, and I entertain no doubt that by it the property was mortgaged for Rs. 4,000, and not Rs. 3,000, and that the mere conditions as to the mode in which Rs. 1,000 of the amount was to be liquidated, did not affect its original character as a mortagage for Rs. 4,000.

The next question relates to s. 7 of the Court-Fees Act; but before considering the precise terms of that section, I may observe that this suit is brought by one of three mortgagors to redeem a particular portion of the mortgaged property. Under ordinary circumstances, this would not only be contrary to all principle, but it would also be contrary to an express rule of law now contained in the Transfer of Property Act. The reason, however, why the plaintiff is entitled to sue for redemption of a portion of the property is that the mortgagees, themselves having become purchasers of a portion of the mortgaged property, that is to say, they having bought up the equity of redemption of two of the mortgagors, have, *pro tanto*, extinguished their mortgage-debt. For by their purchase they cannot make the residue of the mortgaged property responsible for the entire mortgage-debt, nor can they prejudice the right of the other mortgagors to redeem their proportionate share of the mortgaged property. The mortgagees having broken up the integrity of the mortgage, the plaintiff is entitled to assert his equity of redemption, upon payment of so much as represents his interest under the mortgage. This being so, we have to look at art. ix, s. 7. of the Court-Fees Act, which is as follows:—"In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute," the court-fee is to be calculated "according to the principal money expressed to be secured by the instrument of mortgage." Of course, if we

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are to interpret this language strictly, it is difficult to say that the instrument in question in the present case expresses as secured any other sum than Rs. 4,000, and the extreme contention urged by Pandit *Ajudhia Nath* was that we must make the plaintiff pay court-fees upon that sum. But it appears to me that the defendants-mortgagees, having broken up the mortgage, and so by their own act having empowered the plaintiff to sue for redemption of one-third of the property, that the principal money now secured as between them and the plaintiff must be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly when it is borne in mind that fiscal enactments should, as far as possible, be construed in favour of the subject. My brother Mahmood reminds me of the observations of Melvill, J., in *Balkrishna Dhondo* v. *Nagvekar* (1) where the same principle was adopted. They are as follows :—"In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of property sued for 'the principal money expressed to be secured,' must be taken to be the proportionate amount of the debt for which such portion of the property is liable."

This ruling I adopt and approve, and applying it to the present case, I am of opinion that the court-fee payable by the appellant is payable on Rs. 1,333-5-4, as mentioned in the judgment of the Subordinate Judge.

So much as to the question of court-fee. And now with reference to the first of the two questions referred to the Full Bench, namely, the jurisdiction of the Munsif to try the suit, which depends upon the construction to be placed on the words "subject-matter in dispute" in s 20 of the Bengal Civil Courts' Act. In the plaint what is alleged is that the plaintiff comes into court to redeem one-third of the mortgage for Rs. 4,000, and such is the case, as I have already said, he is entitled to make. There is a long current of rulings in this Court to the effect that "the subject-matter in dispute" in suits of this kind is the amount of the mortgage-debt and the mortgagee's rights which are sought to be paid off; and whether these rulings are right or wrong, they repre-

(1) I. L. R., 6 Bom. 324.

sent a long current of authority from which, for my own part, I should hesitate to depart. According to the rule of "*stare decisis*," I must assume that they are right, and follow them; and this being so, it follows that the subject-matter in dispute in the present suit is the mortgage debt and the rights of the mortgagees which the plaintiff seeks to clear off. It is therefore obvious from the terms of the plaint, that in this the subject-matter in dispute was Rs 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000. Without basing my judgment therefore upon the reasons stated by the Subordinate Judge, who appears to have mixed up fiscal considerations with those relating to jurisdiction, I think that he was right in his conclusion that Rs. 1,333-5-4 was the value of the mortgagee's interest and the subject-matter of the suit, and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. The order of the Subordinate Judge that the plaint should be returned for presentation to the proper Court was correct. My answer to this reference is in the sense indicated by the foregoing observations.

OLDFIELD, BRODHURST and TYRRELL, JJ, concurred.

MAHMOOD, J.—The judgment of the learned Chief Justice makes it unnecessary for me to say much, for I have arrived at the same conclusions. He has shown that the exigencies of the case do not require us to rule what I may call the major hypothesis upon which Pandit *Ajudhia Nath's* argument proceeded, namely, that in all suits for redemption, the subject-matter is not the amount which the plaintiff offers to pay to the defendant, the mortgagee in possession, but the suit must be regarded as a claim for possession of immoveable property, to which claim there is a plea resisting such possession. But though we are not bound to decide this large question, I cannot help, with due respect for the rulings cited by Pandit *Nand Lal*, doubting their accuracy. For I am inclined to think that a suit for redemption against a mortgagee in possession, is, on principle, a suit by an owner having for its object the realisation of the incidents of ownership, and the plea of a subsisting mortgage amounts to seeking to establish a qualification of that ownership: and in such a dispute the scope of the subject-matter, for purposes of

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jurisdiction, would seem to be the plaintiff's ownership of the property, and not the qualification which the defendant seeks to set up as a limitation upon that ownership. Again, the allegation of the plaintiff as to the extent of the limitation upon his ownership, would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst on the one hand, he may be met by a plea that the mortgage charge is far higher than that stated by him, on the other hand, I think that the learned Pandit for the respondents put the matter very forcibly, when he said that there may be cases in which the plaintiff offers to pay nothing at all, because the whole amount of the mortgage-money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the plaintiff-mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value. Perhaps a more plausible theory would be to say that the value of the subject-matter of a redemption suit is the value of the property *minus* the mortgage charge, that is, the difference between the two. But then the difficulty would arise how to determine the amount of such difference without going into the merits of the defendant-mortgagee's allegation as to the extent of his incumbrance. And of course, apart from the question of the mortgage-money, a redemption suit may be met by the plea that either on account of foreclosure or prescription, the right of redemption no longer exists,—and it is obvious that in such a dispute the whole *corpus* of the property would be at stake, whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon. These observations have been made by me only to illustrate the nature of the considerations which lead me to doubt the rulings upon which Pandit *Nand Lal* relied, and in this I am supported by an unreported judgment of this Court in *Muhammad Dilawar Khan* v. *Arthur Gardener* [S. A. No. 1039 of 1877, decided on the 18th January, 1878] in which Turner and Spankie, JJ., held that the property mortgaged was the subject-matter in dispute, and, as the *corpus* of the property in that case largely exceeded the Munsif's jurisdiction, they held that he was not competent to try the suit.

I must, however, not be understood as laying down any definite rule upon this point, for, as I have already said, the observations of the learned Chief Justice satisfy the exigencies of this particular case.

The question of valuation for purposes of court-fees rests upon very different considerations, for, as pointed out by the Lords of the Privy Council in *Lekraj Roy* v. *Kanhya Singh* (1), "the stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact." This distinction of principle must never be lost sight of. In the case of *Cotterell* v. *Stratton* (2), cited by Pandit *Nand Lal*, the judgment of Malins, V. C., is entitled to high respect; but all that he there ruled was that, for purposes of law taxation, a certain standard should be taken as the amount of the subject-matter. No question of jurisdiction was before the Court in that case, and it is therefore not applicable, because, while in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court—a view which is in keeping with the principles upon which the Full Bench ruling of this Court in *Nidhi Lal* v. *Mazhar Husain* (3) proceeded. Therefore, as to the valuation for purposes of court-fees, I agree in all that has fallen from the learned Chief Justice, and I also readily adopt the views of Melvill, J., in the case to which the learned Chief Justice has referred. But then the learned Pandit on behalf of the respondent has referred to another case—*Umar Khan* v. *Mahomed Khan* (4)—which, he contends, has the effect of laying down the rule that in a case such as the present the plaintiff-appellant should be made to pay the court-fees upon the *whole* mortgage-money expressed to be secured by the mortgage-deed. There may be some difficulty in reconciling the case with the ruling of Melvill, J., and I might, perhaps, with due respect, say that it keeps out of sight the salutary rule of construction adopted by the Courts in England, namely, that statutes imposing burdens upon the subject must, in every case of doubt, be interpreted in favour of the subject. But I think it is

(1) L. R., 1 Ind. Ap. 317.
(2) L. R., 17 Eq. 543.
(3) I. L. R., 7 All. 230.
(4) I. L. R., 10 Bom. 41.

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unnecessary for me to say anything definite as to whether I concur in, or dissent from, the ruling, because Birdwood, J., who laid down the rule, distinguished it from cases such as the present, where the decree has not been split up or made the subject of more than one appeal.

The ruling, therefore, is not on all fours with the present case, and I need say nothing more about it here.

For these reasons I concur in the answers proposed by the learned Chief Justice to both the questions before the Full Bench.

1886 April 22.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

GANGADHAR AND ANOTHER (PLAINTIFFS) *v.* ZAHURRIYA AND ANOTHER (DEFENDANTS) *

Landholder and tenant—Suit for the removal of trees—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 32—*Jurisdiction—Civil and Revenue Courts—Act XII of* 1881 (*N.-W.P. Rent Act*), *s.* 93 (*b*).

Held that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court. *Deodat Tiwari* v. *Gopi Misr* (1) referred to.

Held also that No 32, sch ii of the Limitation Act (XV of 1877), applied to the suit. *Raj Bahadur* v. *Barmha Singh* (2), *Amrit Lal* v. *Balbir* (3), and *Kedarnath Nag* v. *Khetturpaul Sritirutno* (4), referred to.

THE plaintiffs in this case sued the defendants for the removal of certain trees planted by the latter on land held by them as occupancy-tenants, the plaintiffs being the landholders. The suit was instituted in the Court of the Munsif of Shamli, zila Saháranpur. The defendants set up among other defences the defence that the suit was not cognizable in the Civil Courts, under the provisions of s. 93 (*b*) of the N.-W. P. Rent Act (XII of 1881). The Court of first instance allowed this defence, relying on *Deodat Tiwari* v. *Gopi Misr* (1). It found also that that the trees, the removal of which was sought, had been planted some eight years

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* Second Appeal No. 1313 of 1885, from a decree of C W P. Watts, Esq., District Judge of Saháranpur, dated the 3rd July, 1885, confirming a decree of Maulvi Muhammad Tajammul Husain, Munsif of Shamli, dated the 15th January, 1885.

(1) Weekly Notes, 1882, p. 102.
(2) I. L. R., 3 All. 85.
(3) I. L. R., 6 All 68.
(4) I. L. R., 6 Calc 34.

before the suit was brought; and that the plaintiffs had acquiesced in the planting of the trees when it became known to them. On appeal by the plaintiffs the lower appellate Court (District Judge of Saháranpur) expressed no opinion on the question of jurisdiction, having regard to the provisions of s. 207 of Act XII of 1881, but held that the suit was barred by limitation, applying No. 32, sch. ii of the Limitation Act (XV of 1877). It found that the trees had been planted more than two years before the suit, but did not find when the planting first became known to the plaintiffs.

The plaintiffs preferred a second appeal on the ground that the suit was not governed by No. 32, sch. ii of the Limitation Act.

For the defendants it was objected that the suit was not cognizable in the Civil Courts.

Pandit *Sundar Lal*, for the appellants.

Babu *Ratan Chand*, for the respondents.

TYRRELL, J.—This was a very simple suit brought by the plaintiffs-appellants, who are admittedly zamindars of the land in suit, against the defendants, who are occupancy-tenants of the land, seeking to restrain the defendants from converting arable land into a grove or wood. The Courts below have concurred in holding that the suit is barred by limitation. They have applied art. 32, sch. ii of Act XV of 1877, and in my opinion the article has been rightly applied. They have held broadly that some of the trees were planted some seven years ago, and some were planted within a year from the date of the suit. These findings alone are not sufficient for the disposal of the case. The lower Courts have not determined the *terminus a quo* of the period from which the limitation begins to run. Under that clause the limitation begins to run from the date "when the perversion first becomes known to the person injured thereby." It is therefore necessary to have this point determined. And I would therefore remit the following issue for determination by the Court below:—

When did the plaintiff first become aware of the perversion of the land?

The finding when made will be returned to this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

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MAHMOOD, J.— I concur in the order proposed by my brother Tyrrell, but I wish to add a few words. The learned pleader for the respondent has contended that the suit was one cognizable by the Revenue Courts, and has relied upon the case of *Deodat Tiwari* v. *Gopi Misr* (1). The judgment of the Court in that case was delivered by my brother Brodhurst, and I concurred in that judgment. Now, s 93 (*b*) of Act XII of 1881 provides that "suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let" lie in the Revenue Court. It was under this section that my brother Brodhurst and myself held in that case that that suit was cognizable by the Revenue Court. I have carefully examined the remnants of the record that remain in this Court, namely, the judgments of the two Courts in that case, but in the absence of the plaint it is impossible to say how far that ruling applies to this case.

Now, the plaint in this case is not for the ejectment of the tenant, but virtually seeks an injunction, directing the tenant to remove the trees in question. This relief cannot be granted by the Revenue Courts, and the suit is therefore cognizable by the Civil Court. The learned pleader for the appellant has drawn my attention to two rulings of this Court in *Raj Bahadur* v *Birmha Singh* (2) and *Amrit Lal* v. *Balbir* (3). The first of these cases is a Full Bench ruling, and I agree with the learned pleader in thinking that the principle of the rulings in those cases applies to this case. I agree with my brother Tyrrell in holding that art. 32, sch. ii of Act XV of 1877, applies to this case, and that the limitation runs from the date "when the perversion first becomes known to the party injured thereby."

The learned pleader for the appellant has also called my attention to a ruling of the Calcutta High Court in the case of *Kedarnath Nag* v. *Khetturpaul Sritirutno* (4). I have carefully considered the judgment in that case. The portion which deals with the point now raised occurs at the end and is as follows:—"As to the limitation, we think with the lower appellate Court that art. 32 does not apply to this case. It seems to us to fall under art.

(1) Weekly Notes, 1882, p. 102.
(2) I. L. R., 3 All 85.
(3) I L R, 6 All. 68.
(4) I. L R, 6 Calc. 34.

120, which gives a period of six years." No doubt the learned Judges in that case had very good reasons for coming to that conclusion, but I have not had the advantage of considering them, as the report gives no reasons upon this point. Under the circumstances I agree with my brother Tyrrell in remanding the case as proposed by him.

Issue remitted.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1886 *May 5.*

JAWAHAR SINGH (PLAINTIFF) *v.* MUL RAJ (DEFENDANT). *

Arbitration—Powers of arbitrators—Payment by instalments—Appeal—Civil Procedure Code, ss. 518, 522.

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed.

Held that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522 of the Code.

Held also that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed.

Per MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in s. 522 were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518

THE appellant in these cases, Jawahar Singh, brought two suits against the respondent, Mul Raj, one being to recover Rs. 1,316 due for profits and Government revenue and the other for Rs. 2,687-14 due on a bond. The parties referred the matters in dispute in these suits to arbitration. The majority of the arbitrators,

* Second Appeals Nos. 1483 and 1484 of 1885, from decrees of C. W. P. Watts, Esq., District Judge of Saháranpur, dated the 29th May, 1885, modifying decrees of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saháranpur, dated the 27th February, 1885.

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in the suit for profits and Government revenue, awarded the plaintiff Rs. 1,021-9, and in the suit on the bond, Rs. 1,778-7, and directed that both these amounts should be paid by certain instalments, and that each party should pay his own costs in both suits. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and each party to bear his own costs. The Court of first instance accepted the award, except in so far as it directed payment by instalments of the sums, holding that the arbitrators had no power to make such a direction. The defendant appealed from the decree of the first Court in both cases with reference to the question of payment by instalments, and the plaintiff preferred objections to the decree in both cases, under s. 561 of the Civil Procedure Code, with reference to costs.

The lower appellate Court held that the arbitrators were empowered to direct payment by instalments, but it was of opinion that they had not exercised this power with discretion, and it reduced the number of instalments. It dismissed the plaintiff's objections, holding that the arbitrators had full power to make the order they did relative to costs.

The plaintiff appealed to the High Court in both cases, contending that the decree of the first Court was not appealable; that the arbitrators had no power to order payment by instalments; and that the lower appellate Court had improperly dismissed his objections relative to costs. The defendant preferred an objection under s. 561 of the Civil Procedure Code, to the effect that "the lower appellate Court was wrong in amending the award passed by the arbitrators as to the time fixed for the payment of the instalments."

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellant.

Mr. *Carapiet*, for the respondent.

OLDFIELD, J.—In this case the plaintiff sued to recover a sum of money due for profits and Government revenue. In the Court of first instance the dispute was referred to arbitration, and the majority of the arbitrators gave an award in favour of the plaintiff for Rs. 1,021-9, payable by instalments. The first Court, under s. 518 of the Code, modified the award, so far as it related to the payment of instalments, on the ground that this was not a

matter which was referred to arbitration. The defendant appealed to the District Judge; and the Judge, though allowing the power of the arbitrators to settle the manner of payment of the instalments, reduced the number of the instalments that had been fixed. From this decision the plaintiff has appealed, and the defendant has filed objections. The plaintiff's plea that no appeal lay to the Judge is bad, with reference to s. 522 of the Code, which disallows appeals "except in so far as the decree is in excess of, or not in accordance with the award." I am of opinion that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge. With regard to the defendant's objection, it has force. The question before the Judge was, whether the first Court had rightly modified the award under s. 518 of the Code, and from the terms of the reference to arbitration, it is clear that it gave the arbitrators full powers, not only as to the amount to be paid, but also as to the mode of payment. Under these circumstances, it appears to me that the plaintiff's appeal must be dismissed, and the defendant's objection allowed, and a decree will be passed in the terms of the award. Each party will bear their own costs. The defendant will have the costs in this Court.

In the connected case, S. A. No. 1484 of 1885, I am of opinion that the plaintiff's appeal fails, because there was an appeal to the Judge, and as no objections have been taken here to the Judge's decree, it is sufficient to say that the appeal must be dismissed with costs in this Court.

MAHMOOD, J.—I concur in my learned brother Oldfield's judgment in both cases. In S. A. No. 1483 of 1885, the submission to arbitration, dated the 19th November, 1884, refers all the disputes involved by the suit between the parties; in other words," the reference '*of a cause*' and '*of all matters in difference in a cause*' means exactly the same thing, and only gives the arbitrators power to decide on the questions raised by the pleadings, which are necessary for the determination of the cause" (Russell on *Arbitration*, p. 117). This shows that the arbitrators cannot go beyond the scope of the suit. Now, in this case, the claim is one for money, and a large part of the argument of the learned Munshi on behalf of the appellant was to the effect that the arbitrators exceeded their powers in fixing the instalments. Again,

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at p. 391 of Mr. Russell's work, it is said :—" An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit. It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the future day. So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time. He may direct payment to be made by instalments. He may add that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue the whole amount shall be payable at once." This is the general rule which is observed in England, and I see no reason why it should not equally be followed in this country. With reference to the remarks of my learned brother as to s. 518 of the Code, I agree that the word " award," used in the last sentence of s. 522, must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words " in excess of, or not in accordance with, the award," used in the former section, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518, and, in the absence of such a check, a Court of first instance, professing to act under s 518, might pass a decree far in excess of the powers given by that section.

Under these circumstances I agree with the orders proposed by my learned brother Oldfield in both cases.

1886 *May* 21.

Before Mr Justice Straight, Offg Chief Justice, and Mr Justice Mahmood.

MAHRAM DAS (PLAINTIFF) *v.* AJUDHIA (DEFENDANT) *

Act IV of 1882 (*Transfer of Property Act*), *ss* 10, 11—*Vendor and purchaser—Contemporaneous "ikrar namah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co sharer—Collection of rents by co sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages.*

M, a co sharer in a village, transferred to *A*, another co-sharer, a two annas share, by deed of sale. Upon the same date, *A* executed an *ikrar namah* in which

* Second Appeal No. 1640 of 1885, from a decree of J. Liston, Esq, Deputy Commissioner of Lalitpur, dated the 2nd June, 1885, confirming a decree of J. Greenwood, Esq, Extra Assistant Commissioner of Lalitpur, dated the 14th April, 1885.

he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. A suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrar-namah*, *A* had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by *A*, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from *A*, the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrar-namah*, to avoid the sale-deed which preceded it.

Held that the deed of sale and the *ikrar-namah* must be regarded as recording one single transaction, *i.e.*, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Purshad* v. *Luchmi Purshad* (1) referred to.

Held that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.

Holman v. *Johnson* (2), *Anantha Tirtha Chariar* v. *Nagmutlu Ambalagaren* (3), *Bradley* v. *Peixoto* (4) and *Hussain Khan Bahadur* v. *Nateri Srinivasa Charlu* (5) referred to. *Balaji J. Rahalkar* v. *Narayanbhat* (6) distinguished.

Held by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

Held by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal

(1) I. L. R., 10 Calc. 30.
(2) 1 Cowper, 543, quoted in Leake on Contracts, 970.
(3) I. L. R., 4 Mad. 200.
(4) Tudor's Leading Cases on Real Property, 968.
(5) 6 Mad. H. C. Rep 356.
(6) 6 Bom. H. C. Rep., A. C., 63.

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with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali* v. *Thangakki Ammal* (1), *Jalam Punja* v. *Khoda Javra* (2), *Kabir* v. *Mahadu* (3), and *Pranshankar Shivshankar* v. *Govindhlal Parbhudas* (4), referred to.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram*, for the appellant.

Babu *Ratan Chand*, for the respondent.

STRAIGHT, Offg. C. J.—This was a suit brought by plaintiff-appellant under the following circumstances:—The plaintiff is the owner of a nine annas and six pies share in a village, in which the defendant is the owner of a four annas share. Prior to 1880, the defendant sold his four annas share to the plaintiff. On the 24th August, 1880, the plaintiff re-transferred two annas out of the four to the defendant for Rs. 50. This sale was effected by a sale-deed of that date. Concurrently with the sale-deed an *ikrar-namah* or agreement was executed by the defendant, in which, among other things, the defendant undertook that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and would not alienate or mortgage it, or otherwise exercise proprietary rights over it. It was further provided that in the event of the defendant committing any breach of these covenants of the agreement, the sale should be avoided, and the proprietary rights in the two annas should re-vest in the plaintiff. This suit has been brought by the plaintiff on the allegations that, in breach of the covenants of the agreement, the defendant has collected the rents of the share; that he has sought to obtain partition thereof by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff has been compelled to sue the tenants; that in those suits the tenants have exhibited receipts given by the defendant, on the basis of which his suits have been dismissed; and that he has thus been subjected to various costs and expenses. He therefore claims, by way of damages, from the defendant the amount of these costs and expenses as having been incurred by him in consequence of the defendant's action. He further claims, by reason of

(1) 6 Mad. H. C. Rep., 192.
(2) 8 Bom. H. C. Rep., A. C., 29.
(3) I. L. R., 2 Bom. 360.
(4) I. L. R., 1 Bom. 467.

the *ikrar-namah* of the 24th August, 1880, to avoid the sale-deed which preceded it. The Courts below have dismissed the claim on the ground of limitation, the lower appellate Court holding that art. 91 of the Limitation Act was applicable, and the suit, having been brought beyond five years from the date of the plaintiff's obtaining knowledge of the defendant's breach of the covenants, was barred by time. It appears to me that neither of the Courts have dealt with the case upon the correct footing. The sole ground upon which I propose to dispose of this appeal and the suit is this: I think, in the first place, that the two instruments of the 24th August, 1880, must be regarded as recording one single transaction. That is to say, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the defendant by the plaintiff. In this view, it is clear from the *ikrar-namah* that the proprietary title in the share conferred on the defendant and created by the sale-deed is thereby cut down to *nil;* in other words, limitations are placed upon it which render it useless as a proprietary right. Now the principle embodied in s. 11 of the Transfer of Property Act has been recognised time out of mind by Courts, both of law and equity, in dealing with such agreements; and as the reason for it I do not think that I can do better than refer to the observations of Lord Mansfield in *Holman* v. *Johnson* (1). He says:—"The objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff."

As I understand it, provisions in a contract of the kind before me, which absolutely debar the person to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognise or give effect to; and that a covenant in a sale-deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in viol-

(1) 1 Cowper, 543, quoted in Leake on Contracts, 970.

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the principle enunciated in ss. 10 and 11 of the Transfer of Property Act. The agreement, therefore, on the basis of which the plaintiff in this case asks for relief, is one which no Court should, in my opinion, assist him in enforcing, for, as I have already remarked, the sale-deed and *ikrar-namah* must be read as one instrument and as recording a single transaction. I, therefore, uphold the decision of the lower appellate Court, but on grounds different from those which that Court has given, as, upon the point of limitation, I think the Deputy Commissioner was wrong. I am of opinion that the suit failed, the plaintiff not being entitled to have the relief prayed by him, and that this appeal must be, and it is, dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusions as the learned Chief Justice, but as both of the judgments of the Courts below have dealt with the case in an unsatisfactory manner, I am anxious to recapitulate the important facts essential to the determination of the question of law involved. I have read the original record and it appears to me that the case cannot properly be disposed of upon the ground of limitation, as it has been by both the lower Courts. I need say nothing further as to the point of limitation, because I think with the learned Chief Justice that, upon the merits, the suit is unmaintainable. The facts of the case are, that in a village called Dasui, there was a nine annas and six pies share of Mahram Das, the plaintiff in this case, and a four annas share owned by Partab and Ajudhia, the former of whom was the father of the latter, who is the defendant. Early in the year 1880, a sale-deed was executed jointly by Partab and Ajudhia, conveying the four annas share to Mahram Das. Under this deed an area of 15 acres was specially reserved for the vendors. It appears that when *dakhil-kharij* was to be effected in the revenue records, the vendors did not, as required by the rules, consent to express their concurrence, and no *dakhil-kharij* was carried out. So matters stood when the vendee Mahram Das, on the 24th August, 1880, executed a deed of sale, whereby he conveyed a two annas share out of the four annas previously purchased by him from Partab and Ajudhia, to the latter. This deed contained a clause to the effect that the covenant as to the 15 acres contained in the former sale-deed was null and void, and that the rights of

the parties should in future be governed by the new sale-deed. Contemporaneously with this deed, Ajudhia executed an *ikrar-namah* of the same date in favour of the plaintiff Mahram Das, containing certain specific conditions, which were a reproduction of some of the most important terms of the sale-deed itself. Now, I concur with the learned Chief Justice that these two documents should be treated as if they recorded one and the same transaction, and should be read together in order to ascertain the intention of the parties. If any authority is required for this view, the reports are full of cases on the point in connection with the *bye-bil-wafa* form of mortgages. The Courts in this country have ruled to this effect, when it appears that the deed of absolute sale is accompanied by a contemporaneous *ikrar-namah* by a mortgagee or conditional vendee, providing for the re-conveyance of the property to the mortgagor on payment of the price the mortgagee has paid. This view is borne out by the principle on which the judgment of the Privy Council in *Sital Purshad* v. *Luchmi Purshad* (1) proceeded. Reading the two documents as one, there is every reason to say that if any part of either is such as the law disallows, it must be treated as invalid to that extent. The sale-deed, after reciting that Mahram Das was the owner of a nine annas and six pies share, and had purchased four annas, sets forth conditions which I need not mention, because they are more fully stated in the *ikrar-namah* executed by Ajudhia upon the same dates. The chief points in the *ikrar-namah* are—(i) that the vendee Ajudhia would never sell or mortgage what he had purchased, and if he did, it would be to Mahram Das himself only, for the same price as he had paid; (ii) the executant Ajudhia would never have the right to ask for partition of his share, and was bound to keep it joint, and Mahram Das was entitled to collect rent therefrom; (iii) the property purchased was to remain in the possession of the vendee, and devolve upon his natural or adopted heirs; but in case neither were alive, no other person could succeed to the property under the ordinary law. There were other conditions as to the rent payable by the vendee for the land cultivated by himself, and the condition as to the 15 acres in the old sale-deed was set aside. Then comes an important clause to the effect that if the vendee should act in breach of the terms of the agreement, the sale-deed of the two

(1) I L R, 10 Calc 30.

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annas share executed by Mahram Das to Ajudhia should be treated as "waste paper." Further, the *ikrar-namah* says that this purchase of two annas shall be free from all attachments and sales in execution of decrees, and that if any person should attach the share, then Mahram Das would have the right to pay in Rs. 50, and such person might not bring to sale the property purchased by Ajudhia. The learned Chief Justice has said that the Courts of Equity and of Law in England have never allowed such a transaction, and this rule is based upon fundamental principles of public policy.

After the execution of the two documents, there was a litigation between Mahram Das and Ajudhia in connection with partition. There was a partition by some other co-sharers in the village, and Ajudhia having joined with them, succeeded on the 21st June, 1882, and an order was passed by the Deputy Commissioner that the partition proceedings should go on. On the 8th December, 1884, Ajudhia, in contravention of another condition of the *ikrar-namah*, realized two small items from tenants as rent. In consequence of this the plaintiff, Mahram Das, on the 12th December, 1884, brought a suit in the Rent Court against the tenants for the recovery of rent from them as lambardar. His suit was dismissed on the 14th January, 1885, in consequence of the tenants having proved that they had paid their rents to Ajudhia. Upon this the plaintiff prayed for three reliefs,—first, the cancelment of the deed of sale of the 24th August, 1880, on the ground that, by reason of his breaches of covenant, namely, his action regarding the partition and the collection of rents, the defendant had ceased to be owner; secondly, that the defendant had wrongly received Rs. 30 and again Rs. 10 from the tenants, against the terms of the *ikrar-namah*, and was liable to repay the same to the plaintiff as lambardar, as money had and received to his use; thirdly, a sum of Rs. 9-2, which represented costs incurred by the plaintiff in his unsuccessful litigation in the Revenue Court, and was now claimed by way of damages. I will deal separately with each of the reliefs claimed. As to the nature of the rule formulated by the Legislature in s. 11 of the Transfer of Property Act, I need only say that while at one time it might have been doubtful whether the rule was applicable to transfer by way of sale, or was limited to

grants short of absolute transfer, the mode in which the doctrine has been dealt with by the Legislature is applicable alike to transactions of both kinds. In other words, the principle of s. 11 applies as much to mortgages or leases as to gifts or sales. Among the cases on the subject, perhaps the best authority is the judgment of Muttusami Ayyar, J., in *Anantha Tirtha Chariar* v. *Nagmuthu Ambalagaren* (1), and particularly where it is said :—"It appears to us to be a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant, and, as such, inoperative. We think there can be no doubt on general principles that, when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant." These views are in pursuance of the rule laid down in *Bradley* v. *Peixoto* (2), and is consistent with many other English cases. The same rule obtains in the Muhammadan law. In the case of *Hussain Khan Bahadur* v. *Nateri Srinivasa Charlu* (3), Holloway, J., said that the rule of justice and equity in these cases was universal, and that where the main object of the grant is clear, conditions clearly inconsistent with that object, cannot be held valid. There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction, and to ask what the parties mean by first saying that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but where no reconciliation is possible, the Courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void. So the matter stands in this case. The case is not like that with which Couch, C. J., had to deal in *Balaji J. Rahalkar* v.

(1) I. L. R., 4 Mad. 200.
(2) Tudor's Leading Cases on Real Property, 968.
(3) 6 Mad. H. C. Rep., 356.

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Naryanbhat (1), in which the terms of the document were distinctly capable of being interpreted to the effect that there was "no grant of any interest in the land, except of the personal use of it for the particular purpose specified," and that "it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves." In the present case there is no doubt that the deed of sale purports to be a conveyance of ownership, and therefore all provisions inconsistent with that purpose are null and void. For these reasons I concur with the learned Chief Justice in holding that Ajudhia is not bound by any covenant which derogates from the ordinary legal incidents of ownership.

The second question is, whether the Rs. 30 and Rs. 10 realized by Ajudhia as rent can be recovered in a suit of this kind. It must be observed that, whatever may be the rights of a lambardar in reference to the collection of rents, the defendant in this case, being a co-sharer in the village and having, though perhaps irregularly, realized sums of money from the tenants, he cannot, in a Civil Court and in a suit of this nature, be made to re-pay the lambardar. The only remedy of the latter is to deduct the items when the *bujharat* or rendition of accounts between himself and the co-sharers takes place.

The third point relates to the sum of Rs. 9-2, the costs of litigation in the Rent Court. Upon this point I am anxious to state the reasons for my conclusions, because there exists some conflict of authority. In the case of *Chengulva Raya Mudali* v. *Thangakhi Ammal* (2) the Full Bench of the Madras High Court laid down the rule that an action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document. The *ratio* of this ruling, and in particular of the judgments of Scotland, C. J., and Holloway, J., was that, inasmuch as the Registration Act omitted to provide for costs incurred by a party in the course of obtaining registration, therefore the ordinary Courts were entitled to deal with such costs as ordinary damages. Opposed to this view is a decision of the Bombay High Court in *Jalam Punja* v. *Khoda Javra* (3), in which Westropp, C.

(1) 3 Bom. H. C. Rep., A. C., 63. (2) 6 Mad. H. C. Rep. 192.
(3) 8 Bom. H. C. Rep., A. C., 29.

J., held that no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mamlatdar's Court under Bombay Act V of 1864. So also in *Kabir* v. *Mahadu* (1), where a more reasonable view was adopted. It was there held that an action brought to recover costs of proceedings held under Act XX of 1864, is not maintainable when the Court before which such proceedings were taken has made no order as to the payment of such costs. A similar view was taken in *Pranskankar Shivshankar* v. *Govindlal Parbhudas* (2), where it was ruled that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause, nor will it lie to recover costs awarded by a Civil Court. This no doubt shows some conflict of authority. My own view is, that the real principle is not limited to damages in tort. Wherever a Court has jurisdiction, and a civil suit is brought for the recovery of costs which might have been dealt with in the former litigation, the question may be made the subject of a plea *in limine* upon a matter of procedure. S. 13 of the Civil Procedure Code lays down the general rule of *res judicata*, and it is possible that this rule would in such a case be applicable by analogy. But whatever view may be adopted, the *ratio* depends upon the same principles. Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit.

In the present case the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and they cannot be made the subject-matter of fresh litigation. I am therefore of opinion that the costs cannot be claimed in this suit. For these reasons I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

(1) I. L. R., 2 Bom., 360. (2) I. L. R., 1 Bom., 467.

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May 25.

Before Mr. Justice Oldfield and Mr Justice Mahmood.

SHEOBHAROS RAI AND OTHERS (DEFENDANTS) *v.* JIACH RAI AND OTHERS (PLAINTIFFS) *

Pre-emption—Sale to a co-sharer and stranger—Specification of interest sold to stranger and of price—Right of pre-emption of vendee-co-sharer.

The principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to these transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers.

The *ratio decidendi* of *Bhawani Prasad* v. *Damru* (1) explained. *Sheodyal Ram* v. *Bhyro Ram* (2) distinguished. *Guneshee Lal* v *Zaraut Ali* (3) and *Manna Singh* v. *Ramadhin Singh* (4) dissented from.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers vendees had a pre emptive right of the same degree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property, had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

The facts of this case are stated in the judgment of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondents.

* Second Appeal No. 1568 of 1885, from a decree of J M. C. Steinbelt, Esq, District Judge of Azamgarh, dated the 1st July, 1885, confirming a decree of Munshi Sheo Sahai, Munsit of Muhamadabad Gohna, dated the 12th January, 1885.

(1) I. L. R., 5 All. 197.
(2) N.-W. P. S. D. A. Rep., 1860, p. 53.
(3) N.-W. P. H. C. Rep, 1870, p. 343.
(4) I. L. R., 4 All. 252.

MAHMOOD, J.—The facts of this case may be recapitulated here in order to indicate the point of law which has to be determined.

Tilak Rai (defendant No. 5) executed a deed of sale on the 2nd October, 1884, whereby he conveyed certain specific plots of land constituting an area of 15 bighas 14 biswas and 18 dhurs to—(i) Sheobharos, (ii) Sheo Bhik, (iii) Parkash, (iv) Bali, in lieu of Rs. 250 mentioned in the deed. The deed also conveyed a house No. 1044, which belonged to the vendor, but the covenant of sale expressly states that the conveyance was made according to the specification contained in a schedule at the foot of the deed. That schedule shows that out of the area of cultivated land, plots Nos. 707, 1001 and 1002, constituting 2 bighas 5 biswas and 13 dhurs, was sold to Bali, and the rest of the plots to the other three vendees. As to the house, there is no express mention ; but the schedule shows that the price paid by Bali in lieu of all that he purchased under the deed was Rs. 49, whilst the remaining sum of Rs. 201 was the amount of the consideration paid by the other three vendees for what they took under the sale.

The suit from which this appeal has arisen was instituted by Jiach Rai and others, co-sharers of the same *patti* as the vendor Tilak Rai, and as such entitled to pre-emption under the terms of the *wajib-ul-arz* in respect of the sale above-mentioned. The lower appellate Court has found that, with the exception of Bali, the other three vendees are sharers in the same *thok* as the vendor Tilak, and therefore entitled to a pre-emptive right of the same degree as the plaintiffs. But notwithstanding this finding, the learned Judge has upheld the decree of the Court of first instance, decreeing the claim in respect of the whole property covered by the sale-deed, on the ground that the three co-sharers of the *thok* having joined Bali, a stranger, in purchasing the property, they had forfeited their pre-emptive right, and could not resist the plaintiffs' suit, even in respect of such portion as they had bought under the sale.

From this decree the three vendees, Sheobharos and others, who have been found to be co-sharers of the *thok*, have preferred this appeal, and the learned Munshi, who has appeared on behalf of the appellant, has confined his argument to the contention that

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upon the findings of the lower appellate Court itself the suit should have been dismissed, so far as the portion of the property purchased by the appellants is concerned. On the other hand, the learned pleader for the respondent has relied upon certain rulings which I shall presently deal with.

I am of opinion that the contention pressed upon us by the learned pleader for the appellants has force, and that this appeal must prevail. In the case of *Sheodyal Ram* v. *Bhyro Ram* (1) it was held by three learned Judges of the late Sudder Dewany Adalat of these provinces, that the sale of a share of an estate to a stranger jointly with a co-sharer of the village was in violation of the terms of the *wajib-ul-arz*, the express object of which was to prevent the intrusion of strangers, and that as the sale was one and indivisible, the claimant of pre-emption was entitled to a decree in respect of the whole property sold. Then in the case of *Guneshee Lal* v. *Zarauk Ali* (2), a Division Bench of this Court carried the rule further by applying it even to a sale-deed in which the shares purchased by the strangers were separately specified, and the latter ruling was again followed in *Manna Singh* v *Ramadhin Singh* (3), where it was held that even an express specification of the shares purchased by each vendee could not alter the joint nature of the sale transaction, or permit of its being broken up and treated as involving separate contracts, so as to entitle the co-sharer who has purchased along with a stranger to resist the pre-emptive suit, even in respect of his own specific share.

The first two of these rulings were referred to by me in *Bhawani Prasad* v. *Damru* (4), not with the object of agreeing or dissenting from the rule therein laid down, but simply to point out the analogy with the point which was then before me. The exact question with which I had to deal in that case was that a plaintiff-pre-emptor who, in claiming pre-emption, joins a stranger in the suit, cannot succeed, because the very nature of his claim violates the fundamental principle of the pre-emptive right. And because the lower Courts in this case have misunderstood a portion of what I said in that case in giving expression to my *ratio decidendi*, I wish to explain my meaning in saying that a pre-emptor

(1) N.-W. P. S. D. A. Rep., 1860, p. 53.
(2) N.-W. P. H. C. Rep., 1870, p. 343.
(3) I. L. R., 4 All. 252.
(4) I. L. R., 5 All. 197.

"who, in purchasing property himself, *joins a stranger in such purchase*," could not subsequently "resist the claim of other pre-emptors, who in suing for pre-emption vindicate the policy of the right." All that I meant by the words which I have emphasized was, that the nature of the joint purchase should be such as to make it as impossible to ascertain the interests acquired by each of the joint purchasers as it would be in the case then before me to ascertain how much the pre-emptor was claiming, and how much of the pre-emptive interests he had made over to the stranger whom he had joined in instituting the joint suit. That in such cases the sale, on the one hand, and the suit on the other, cannot be subjected to a division of interests, is obvious ; and an illustration of this is to be found in the recent case of *Karan Singh* v. *Muhammad Ismail Khan* (1), in which Petheram, C.J., laid down a rule which, in the result, has the same effect as the rule laid down by me in *Bhawani Prasad* v. *Damru* (2). And I wish to add that nothing which I said in the latter case should be so understood as to lay down the broad rule that in every case, regardless of the nature and incidents of the transaction of sale, the mere fact of a stranger having acquired rights under the same sale-deed as a co-sharer entitled to pre-emption under the *wajib-ul-arz*, would entitle the other co-sharers to pre-empt even the separately specified portion of property purchased by a co-sharer entitled to an equal pre-emptive right.

In the present case the sale-deed contains an exact specification of the shares purchased and the price paid by the vendees-appellants, and it contains also an exact specification of the shares purchased and the price paid by the vendee-defendant Bali. The case of *Sheodyal Ram* v. *Bhyro Ram* (3) is not in point, because the three learned Judges who decided that case adopted as their *ratio decidendi* that the shares sold and sought to be pre-empted were not capable of division, and were not separately specified. In the case of *Guneshee Lal* v. *Zaraut Ali* (4) I respectfully think the rule was carried too far, and so also in *Manna Singh* v. *Ramadhin Singh* (5). With neither of these rulings am I prepared to agree, because the principle or *ratio decidendi* of denying the right of

(1) I. L. R., 7 All. 860.
(2) I. L. R., 5 All. 197.
(3) N.-W. P. S. D. A. Rep., 1860, p. 53.
(4) N.-W. P. H. C. Rep., 1870, p. 342.
(5) I. L. R., 4 All. 252.

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pre-emption, except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. In the two last-mentioned cases, the shares are separately specified, and where such shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale-deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of the Muhammadan law of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he objects to the intrusion of only one of the purchasers, and wishes to exclude him by pre-empting the specific share which such purchaser has individually acquired. And the principle in its application to the present case shows that the exclusion of the purchaser Bali is all that the pre-emptive terms of the *wajib-ul-arz* necessitate, and he would be subjected to no hardship, such as the breaking up of a single bargain implies, if he has to give up all that he has purchased, and receives the price which he individually paid for his specific share of the property.

For these reasons I hold that the lower appellate Court in dealing with this case should not have decreed the claim for pre-emption against the present appellants, who are co-sharers in the same *thok* as the vendor, and as such had an equal right of purchase to that of plaintiffs in respect of the shares specified in the deed of the 2nd October, 1884, as purchased by them.

I would decree this appeal and set aside the decrees of both the lower Courts, so far as they decree the claim of the plaintiffs-

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respondents to that portion of the property which was purchased by the appellants, and to the extent of the claim which has been successfully resisted by defendants, the plaintiffs will pay costs in all the Courts The plaintiffs will be entitled to a decree in respect of the share purchased by Bali against the vendor-defendant and Bali, defendant, with costs, to that extent, incurred in the Court of first instance, on condition of the plaintiffs depositing in that Court the sum of Rs. 49 for payment to Bali, defendant, within one month from the date when this decision reaches that Court, otherwise the suit in this respect also will stand dismissed with costs.

The decree will be prepared in the above terms with reference to s 214 of the Civil Procedure Code.

OLDFIELD, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight, Offg Chief Justice, and Mr Justice Mahmood.

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DEOKI NANDAN (DEFENDANT) *v* DHIAN SINGH (PLAINTIFF). *

Sir land—Ex-proprietary tenant—Nature of the right of occupancy—Act XII of 1881 (*N.-W P. Rent Act*), *s* 7—*Trees.*

In a suit for recovery of possession of zamindari property conveyed by a sale deed, including certain plots of land which were the defendant-vendor's *sir*, the lower Courts held, with reference to s 7 of the North West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

Held that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed

Per MAHMOOD, J, that the principle of the maxim *cujus est solum ejus est usque ad cœlum* was applicable to the case by way of analogy, and that an ex proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed *Bibee Sohodwa* v *Smith* (1), *Narendra Narain Roy Chowdhry* v *Ishan Chandra Sen* (2), *Gopal Pandey* v.

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* Second Appeal No 1632 of 1885 from a decree of F L. Elliot, Esq, District Judge of Allahabad, dated the 12th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1884.

(1) 12 B. L. R. 82. (2) 13 B. L. R 274.

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Pursotam Das (1), *Goluck Ram* v *Nuba Soonduree Dasses* (2), *Shaikh Mahomed Ali* v *Bolakee Bhuggut* (3), *Ram Baran Ram* v *Salig Ram Singh* (4), and *Debi Prasad* v *Har Dyal* (5), referred to.

Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

THE plaintiff in this case sued the defendant for *inter alia* possession of three plots of garden land and the trees thereon situated in a village called Tnawan. These plots were numbered in the village papers 1021, 1024, and 1039. He claimed by virtue of the purchase from the defendant, under a sale-deed, dated the 13th September, 1883, of the defendant's proprietary rights in the village to the extent of an 8 gandas share, together with the trees, groves, and all the rights and interests thereto appertaining. The defence to the suit was that the land was the defendant's *sir*-land at the time of the sale to the plaintiff, and he was entitled to retain possession of it, as also of the trees, as an ex-proprietary tenant, under the provisions of s. 7 of the North-Western Provinces Rent Act (XII of 1881). The Court of first instance (Munsif of Allahabad) held that plots Nos. 1021 and 1039 were the defendant's *sir*-land at the time of the sale, and that therefore he was entitled to the possession of these plots, as an ex-proprietary tenant, under the law mentioned above, but that the plaintiff was entitled to the possession of the trees, as the defendant had sold all the trees, and trees did not come within the operation of s 7 of the Rent Act. The Court accordingly dismissed the plaintiff's claim for possession of lands Nos. 1021 and 1039, but directed that "the plaintiff should be put in possession of the trees."

The defendant appealed, and the lower appellate Court (District Judge of Allahabad) held that the defendant was not entitled to retain the trees, having sold them to the plaintiff.

The defendant preferred this second appeal on the ground that the land being *sir*, and being occupied by the trees in dispute, he was entitled to retain possession of such trees as long as they existed.

(1) I. L. R., 5 All., 121.
(2) 21 W. R. 344.
(3) 24 W. R. 830.
(4) I. L. R., 2 All. 896.
(5) I. L. R., 7 All. 691.

Lala *Jokhu Lal*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

MAHMOOD, J.—In this case I think it is necessary to recapitulate the essential facts in order to indicate the point of law which we are called upon to determine.

The defendant was the owner of a twelve-ganda share of the zamindari interests in a village. Out of that property he, on the 13th September, 1883, executed a sale-deed as to an eight-ganda share, which he conveyed to the present plaintiff with all rights appertaining thereto, including *sir*-lands and *sayar* items, in consideration of Rs 800. It appears, as stated by the plaintiff, that the latter, under the sale-deed, obtained possession on the 30th March, 1884. It is alleged that after this the defendant ousted the plaintiff, this being the cause of the present suit. The object of the suit was the recovery of possession of the whole property conveyed by the deed, including three plots, Nos. 1021, 1026, and 1039, on the ground that these also were included in and covered by the deed.

The Court of first instance framed two issues as to these plots in reference to a plea by the defendant to the effect that these plots were his *sir*, and that he was entitled, under s. 7 of the Rent Act, to hold them as an ex-proprietary tenant. The Court held that out of the three plots, Nos. 1021 and 1039 were found to be the defendant's *sir*-lands, and that, as such, the defendant was entitled to hold possession of them as an ex-proprietary tenant. With respect to the remainder, *i.e.*, the larger portion of the suit, the Court decreed the claim; but with respect to the two plots I have mentioned, the provisions of the statute prevailed, and the plaintiff was held not entitled to oust the defendant from possession. At the same time, as it appeared that these two plots had fruit and other trees upon them, the Court decreed the claim in such a manner as to award the plaintiff possession of those trees. The plaintiff does not appear to have appealed, but the defendant did so to the District Judge. The lower appellate Court has upheld the findings of the first Court upon grounds stated in the judgment, namely, that the nature of an ex-proprietary tenure

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does not entitle the holder to resist a claim of this kind as to the trees on the land which forms the area of that tenure. The lower appellate Court, therefore, affirmed the first Court's decree, and hence this second appeal has been preferred on the ground thus stated in the memorandum of appeal:—"The decision of the learned Judge is against the principle of ex-proprietary tenancy-right, inasmuch as when the land in suit is *sir*, and is occupied by trees, the appellant had a right to retain possession of them while the trees exist." The case, as it has been argued, rests upon this single question, and my conclusion is that the contention has force and the appeal should prevail. It seems to me that the question in the case is one of first impression; that is to say, I am not aware of any decision of this or any other Court in which there is a specific ruling on the subject. I consider it my duty, therefore, to express my views as fully as may be necessary for the purpose of settling the law. In the first place, it is necessary to bear in mind the exact nature of the right of occupancy held by an ex-proprietary tenant in these Provinces. That right is regulated by s. 7 of the Rent Act, which provides as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal, shall have a right of occupancy in the land held by him as *sir* in such mahal, at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants.'" Here then is a statement in clear terms of what are to be the rights of those who, having once been owners of a mahal in whole or in part, cease to be so; and the section ends by saying that these rights in their *sir*-lands are to be those which are enjoyed by occupancy-tenants. At this point I think it will be useful to trace the history of the occupancy-tenure in the Bengal Presidency. I may first refer to the judgment of Phear, J., in *Bibee Sohodwa* v. *Smith* (1) in which a question having arisen as to the nature of the occupancy-right, that learned Judge said:—"This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zamindar by the Legislature, but is, as I

(1) 12 B. L. R. 82.

understand, in derogation of, and has the effect of cutting down and qualifying, that right. I may say that in my conception of the matter, the relation between the zamindar's right and the occupancy-ryot's right is pretty much the same as that which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit à prendre*. It appears to me that the ryot's is the dominant and the zamindar's the servient right. Whatever the ryot has, the zamindar has all the rest which is necessary to complete ownership of the land, subject to the occupancy-ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zamindar all rights and privileges of ownership which are not inconsistent with or obstructive of them." These observations are fully applicable in principle and by way of analogy to the occupancy-rights existing in these Provinces. The next case I wish to refer to is the decision of the Full Bench of the Calcutta High Court in *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen* (1) in which, though in some respects differing from the conclusions of Phear, J., in the case I have quoted, his *ratio decidendi*, and his views as to the nature of the occupancy-right in Bengal were generally adopted. These rulings are important, because the right of occupancy in these Provinces was created at the same time and by the same legislation as in Bengal. The next case is *Gopal Pandey* v. *Parsotam Das* (2). I refer to my judgment in that case, because I was in a minority of one, and my observations have not been summarized in the headnote of the report. After referring to the two cases cited above, I said (at p. 131) that "in the case of an occupancy-tenant the right which the Legislature has conferred upon him is such as subject to the limitation prescribed by the statute, prevails against all the world The subject of the right is the land held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy-right subsists in, and goes with, the land."

Then, after referring to a ruling of the Sudder Board of Revenue, I went on to say:—"I confess I am unable to take any such view. It seems to me to be based upon what, I cannot help feel-

(1) 13 B. L. R., 274. (2) I. L. R., 5 All., 121.

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ing, is a misconception of the nature of the occupancy-right. I have already endeavoured to show, by introducing a comparison between the occupancy-right of an Indian cultivator and the *emphyteusis* of the Romans, that the right, as now defined by the statute, is, subject to its own limitations, as much a real and subsisting right as any other kind of estate carved out of the full ownership of land." The rest of the judgment refers to other matters with which we are not now concerned. I still adhere to the views which I then expressed, and I incorporate them in my present judgment because, in dealing with questions of this kind, I understand that the Mufassal Courts suppose my judgment to have been dissented from, upon all points, by the other members of the Full Bench. My view, as I was not at that time aware, is also supported by the decision in *Goluck Ram* v. *Nuba Soonduree Dassee* (1), where the Judges again compared one kind of tenure in Bengal to the *emphyteusis* of Roman law. Again, there is the case of *Shaikh Mahomed Ali* v. *Bolakee Bhuggut* (2) in which the *ratio* of the judgment of Mitter, J., is in keeping with the view which I entertain, for it was there held that the trees were included in the lease relating to the land on which they stood. Again, I may refer to *Ram Baran Ram* v. *Salig Ram Singh* (3) where the Judges of this Court expressed the view that, by virtue of one incident of the occupancy-right, the trees acceded to the soil, and were liable to be dealt with by the occupancy-tenant, unless something happened to bring his tenure to an end.

No ruling upon the exact point here has been cited before us. The question after all depends mainly upon the interpretation to be placed upon the word "land" in s. 7 of the Rent Act. This is a word which has a very specific legal signification. In the first place, I refer to a passage on p. 420 of Maxwell's work on the "Interpretation of Statutes," where it is said :—"The word 'land' includes messuages, tenements and hereditaments, houses, and buildings of any tenure unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." In India, we have a definition of the expression "immoveable property" in s. 3 of the Transfer of Property Act, in which timber

(1) 21 W. R. 344. (2) 24 W. R. 330.
(3) I. L. R. 2 All. 896.

is excluded from the notion of land—an interpretation which is special to the Act, and which would go to show, if anything, that the word "land" was of wider meaning than the framers of the Act intended should be attached to the term "immoveable property." In the Oudh Rent Act, s. 13, the word "land" is again defined very broadly. Again, s 2, cl. 5 of the General Clauses Act, defines the term "immoveable property" in a manner which, though it tends to support my view, is not conclusive on the question. This being so, I think myself entitled to decide the question by reference to first principles. At p. 293 of Broom's "Legal Maxims," the following remarks occur:—"Not only has land in its legal specification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; and hence the word 'land', which is *nomen generalissimum*, includes not only the face of the earth but everything under it or over it; and, therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows." The author proceeds to say that this general meaning may be varied by special circumstances, such as the terms of a grant, and, I suppose, equally by the provisions of a statute. The maxim is *cujus est solum ejus est usque ad cœlum*. It appears to me that this maxim is based on sound principles, which are fully applicable to this country.

I must not be understood as holding that the occupancy-rights of an ex-proprietary tenant is such as to render that maxim, which is of peculiar importance in England, fully applicable in a matter of this kind. All I say is that the principle underlying the maxim is applicable to a case like this by way of analogy; and I am prepared to hold that an ex-proprietary tenant has all the rights assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which creates it. The Rent Act, in s. 34, cl. (*c*) (1) provides that no tenant (and, *á fortiori*, no occupancy-tenant) is to be ejected from his holding for any act or omission "which is not detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Then s. 93 (*b*) provides for

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"suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let," implying that even a tenant who has an occupancy-right may be ejected. Further, s. 149 provides that "whenever a decree is given for the ejectment of a tenant, or the cancelment of his lease, on account of any act or omission by which the land in his occupation has been damaged or which is inconsistent with the purpose for which the land has been let, the Court may, if it think fit, allow him to repair such damage within one month from the date of the decree, or order him to pay such compensation within such time, or make such compensation within such time, or make such other order in the case as the Court thinks fit; and if such damage be so repaired or compensation so paid, or order obeyed, the decree shall not be executed." So that even if the occupancy-tenant perverts the land, he is not liable to ejectment if he gives compensation.

I refer to these provisions in order to show that the intention of the Legislature was to make the occupancy-tenure as near as possible to full ownership. In support of this view I may refer to my own judgment in *Debi Prasad* v. *Har Dyal* (1), in which I said that a mortgage of his holding by an occupancy-tenant was not in defeasance of the occupancy-tenure, the words of the statute referring not to dealings of this kind, but to physical misuse of the property. Subject to these restrictions, I hold that the occupancy-tenant practically enjoys the incidents of the ownership of the land, and if so he is entitled to the trees on the land, and to use them as long as the tenure exists.

In the present case, the defendant pretended to convey his *sir*-land. Under s. 9 of the Rent Act the sale would be void so far as it purported to operate in defeasance of the occupancy-right. Under the circumstances the Courts below were wrong in holding that the trees did not form part of his tenure, and in saying that possession might be given to the plaintiff-vendee as proprietor of the trees without disturbing the defendant's ex-proprietary tenure. It would be impossible to give effect to such decree without disturbing the ex-proprietary tenant's rights, because if the plaintiff was entitled to possession of the trees, he would be entitled to enter

(1) I. L. R., 7 All. 691.

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upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. Supposing the whole of this land were covered by trees, and possession of the trees was given to the plaintiff, the ex-proprietary tenure would practically be defeated.

For these reasons I would decree the appeal, and direct that the decrees of both Courts be so modified as to dismiss the plaintiff's claim, so far as it seeks possession of the trees within the two plots Nos. 1021 and 1039, which have been found to be *sir*, and that costs in all Courts, as regards this particular part of the subject-matter, be allowed to the defendant-appellant in proportion to the amount involved. Beyond this I would not disturb the first Court's decree.

STRAIGHT, Offg. C. J.—I concur in my brother Mahmood's conclusions as to the proper order to be passed in this case.

Before Mr Justice Straight, Offg Chief Justice, and Mr Justice Mahmood.

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MANGU LAL AND OTHERS (DEFENDANTS) *v.* KANDHAI LAL AND ANOTHER (PLAINTIFFS).*

Act XV of 1877 (*Limitation Act*), *s* 14—"*Prosecuting*"—"*Good faith*"—"*Other cause of a like nature*"—*Limitation Act, construction of.*

In October, 1881, an account was struck between *K* and *M*, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs 885 was paid In March, 1885, *K* sued *M* for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

Held that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

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* Second Appeal No. 1636 of 1885, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Sháhjahánpur, dated the 17th June, 1885, reversing a decree of Rai Bahal Rai, Munsif of Shahjahánpur, dated the 18th April, 1885.

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Per STRAIGHT, Offg. C J —The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

Per MAHMOOD, J —The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or as imposing burdens. *Roddam* v *Morley* (1), *Syed Ali Saib* v *Sri Raja Sanyasiraz Peddabuliyya Simhulu Bahadur* (2), *Empress* v *Kola Lalang* (3), *Bell* v *Morrison* (4), *Shah Keramut Hossein* v. *Golab Koonwur* (5), and *Mohummud Buhadoor Khan* v. *The Collector of Bareilly* (6), referred to

The facts of the case are stated in the judgments of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

Mr. *Abdul Majid* and Pandit *Nand Lal*, for the respondents.

STRAIGHT, Offg. C. J.—This appeal relates to a suit brought by the plaintiffs-respondents under the following circumstances:—The plaintiffs, alleging that on the 12th October, 1881, a certain account was struck between them and the defendants, seek to recover the balance of that account, on account of which a certain sum of Rs. 885-15 was then paid, and the cause of action is stated to have arisen on the 24th February, 1885. It appears that for some time before the 12th October, 1881, there were pecuniary relations between the parties, the plaintiffs having from time to time advanced moneys to the defendants, which were duly entered in the books of the former. On the 12th October, 1881, those accounts were, as I have said, made up, and a balance of Rs. 1,457 was found due by the defendants to the plaintiffs, and it was agreed between them that this was the correct balance then due Rs. 885-15 were paid of this amount, and the debt was reduced in round figures to about Rs. 600, the amount with interest, which the plaintiffs in this suit seek to recover as upon an account stated. I have remarked that in the plaint there is an allegation that the cause of action arose upon the 24th February, 1885, and to explain how this date was arrived at, it is necessary to refer to certain matters in connection with a former suit between the same parties in 1885. It would seem that as far back as 1873, the plaintiffs became the

(1) 1 De G and J. 1; 26 L. J., Ch. 438
(2) 3 Mad. H C Rep 5.
(3) I. L. R, 8 Calc. 214.
(4) 7 Peters (U S.) R. 360
(5) 3 W R 107
(6) L R., 1 Ind Ap 167.

purchasers of the equity of redemption in a zamindari estate, which had been mortgaged to the defendants, and on the 15th November, 1884, a suit was brought by the plaintiffs, as purchasers of that equity, against the defendants for redemption of the mortgaged property. In that suit the plaintiffs put their case in this way; that is to say, after stating the amount of the mortgage-debt due from the original mortgagor to the defendants-mortgagees to be Rs. 1,226, they alleged that by an oral arrangement, which had been come to between the defendants and the plaintiffs on the 4th December, 1881, it had been settled that whenever the latter should claim redemption of the property, they should be allowed to take credit to the extent of Rs. 885, the balance then due from the defendants on the account stated on the 24th October, 1881. I need scarcely point out that this was a very peculiar form in which to present a suit for redemption, though I pronounce no opinion as to its legality; but what it came to was this, that because the defendants owed the plaintiffs the latter sum, they were entitled to redeem the property on paying the difference between Rs. 885 and Rs. 1,226, the amount of the mortgage. The Subordinate Judge decided that suit against the plaintiffs and seems to have given good reasons for his conclusions, their effect being that the agreement set up by the plaintiffs was found not to have been established. Their suit was therefore dismissed to the extent that they were not allowed to redeem except on payment of the whole sum of Rs 1,226 due upon the mortgage. This dismissal took place on the 24th February, 1885. This is how we get at the date which the plaintiff assigns as that on which his present cause of action accrued. That is to say, he treats the Subordinate Judge's dismissal of his claim to be allowed the amount demanded in the former suit as constituting his present right to sue. This, however, is not the true way of looking at the matter; and the real and only plea with which we are now concerned is that of limitation: because, taking as the starting-point the 12th of October, 1881, when the balance of Rs. 885 was left due by payment on account—unless limitation is saved by some rule under the statute—this suit, which was instituted on the 13th March, 1885, is barred. The question then is whether by s. 14 of the Limitation Act the running of time was suspended from the date the former suit was instituted to the date of its deci-

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sion, namely, the 24th February, 1885. If we are entitled to make this deduction for him, then the plaintiff is within time.

The contention on behalf of the defendants-appellants before us is, that time is not saved under s. 14 of the Limitation Act, and that the plaintiffs' claim is barred. I have therefore to see whether the provisions of s. 14 are applicable. Reading s. 14 of the Act, the first thing I have to ascertain is whether the time the plaintiffs ask to have excluded, was occupied by them in prosecuting with due diligence another civil proceeding against the defendant. As to this I see no reason to doubt that the plaintiff prosecuted the former suit of 1884 with due diligence and in good faith. It was "another civil proceeding," and the question then, according to the further requirement of s. 14, is, was it founded upon the same cause of action as the present suit? I am of opinion that it was not. That part of the plaintiffs' claim in the former suit which sought to have the Rs. 885 treated as an amount paid by the plaintiffs to the defendants, rested on an agreement alleged to have been made on the 12th October, 1881; and it was in virtue of such an agreement that the plaintiffs claimed to be entitled to deduct so much from the redemption-money they would otherwise have had to pay, and not upon the strength of the account stated. Further, the Court which tried the former suit was not unable to entertain it by reason of a defect of jurisdiction. On the contrary, the Court was competent to entertain and did entertain it, and came to a decision adverse to the plaintiffs. Hence it cannot be argued that the case was disposed of for a defect of jurisdiction, or for any cause *ejusdem generis*. It seems to me that it cannot correctly be said that in the former suit the plaintiffs were prosecuting a civil proceeding against the defendants on the same cause of action as that on which they rely in the present suit; and, in my opinion, the rule of s. 14 has no application to the present case. The appeal must be allowed with costs, and the order of the first Court being restored, the suit is dismissed with costs.

MAHMOOD, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are these:—

The defendants held a mortgage charged upon certain zamindari interest in mauza Ikhtiarpur, which is said to have amounted

to Rs. 1,226, in lieu whereof they were in possession of the mortgaged property. Some time about the year 1873, one Ram Prasad, ancestor of the plaintiffs, purchased the equity of redemption from the original mortgagor, subject to the defendants' lien. It is then stated by the plaintiffs that in respect of certain monetary dealings the defendants were indebted to them for a sum of Rs. 1,457, which, after a statement of account, was found as the balance and signed and acknowledged by the defendants on the 4th December, 1881, when they paid Rs. 885-15 towards the debt, thus reducing the balance to about Rs. 600. Subsequently, on the 15th November, 1884, the plaintiffs instituted a suit against the defendants for redemption of their zamindari interests in mauza Ikhtiarpur, and in that suit they alleged that the amount of the balance due by the defendants to them should be deducted from the mortgage-money under an agreement entered into by the parties for allowing such deduction. The Court which dealt with that suit did not, however, allow such deduction, and in a judgment dated the 24th February, 1885, held that the alleged agreement was not proved upon the evidence, and the finding appears to have become final.

The present suit was commenced by the same plaintiffs against the same defendants for recovery of the sum due by the latter on the alleged statement of account dated the 4th December, 1881, which has been found to be the wrong date—the right date being the 9th Kuar Sudi, 1289 fasli, corresponding to the 12th October, 1881. The suit was instituted on the 13th March, 1885, and there is no question that it would be barred by three years' limitation under art. 64, sch. ii of the Limitation Act (XV of 1877), unless the period of the pendency of the former suit is deducted in computing the limitation under s. 14 of the Act. The Court of first instance dismissed the suit as barred by limitation, though it also went into the merits of the suit. The lower appellate Court on appeal has reversed the decree, holding the suit entitled to the benefit of s. 14 of the Limitation Act, and finding the merits in favour of the plaintiffs.

The learned Munshi, who has appeared on behalf of the appellants, has argued the case upon the solitary ground that the suit

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was barred by limitation, not being, under the circumstances, entitled to the benefit of s. 14 of the Limitation Act. I am of opinion that the contention urged before us by the learned Munshi on behalf of the appellants has force, and must prevail. This case, indeed, in the manner in which it has been dealt with by the lower appellate Court, affords a good illustration of what has so often come within my notice, namely, that the Mufassal Courts are inclined to regard statutes of limitation as operating in derogation of the rights of the parties by barring investigation of the merits; and in this light they are inclined to place as strict a construction against the operation of the statute as if it belongs to the class of penal statutes encroaching on the rights of, or imposing burdens upon, the subject. And I will take this opportunity of giving expression to views which I have long entertained upon the subject; not only because the present case calls for such a course, but also because some uncertainty seems to exist as to the exact manner in which statutes such as our own Limitation Act should be interpreted.

Mr. Maxwell, in his well-known work on the "Interpretation of Statutes," after referring to statutes which encroach on rights, goes on to say (p. 348):—"It would seem statutes of limitation are to be construed strictly. There may not necessarily be any moral wrong in setting up the defence of lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment; while provisions which give exceptions to the operation of such enactments are to be construed liberally." This view of the law is enunciated by the author on the authority of a judgment of Lord Cranworth in *Roddam* v. *Morley* (1), and I shall presently have to express my opinion about the rule, because I cannot help feeling that if the rule of liberal interpretation is to be applied to s. 14 of our Limitation Act, I should be inclined to agree with the lower appellate Court in holding that the plaintiffs are entitled to the benefit of that section, it being, in the words of Mr. Maxwell, a "provision which gives exception to the operation of such enactments" as our Law of Limitation. But is the rule as stated by Mr. Maxwell free from doubt? We have the following passage in another authority upon the construction of Statute

(1) 1 De G. and J. 1, 26 L. J., Ch. 438.

Law—(Wilberforce, p. 232) :—"The statutes of limitation have given rise to some conflict of opinion. It is said by Heath, J., that these statutes always receive a strict construction from the Courts, and the same view is taken by Mr. Sedgwick. On the other hand, Dallas, C. J, expresses himself thus with regard to the 21 Jac. I, c. 16.—'I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are 'for quieting of men's estates and avoiding of suits.' It is therefore that this statute and all others of this description are termed by Lord Kenyon 'statutes of repose.' The same phrase has been employed and similar opinions have been expressed by the Courts of the United States." Now, whilst there is a conflict of decisions in the English Courts, as to whether the statutes of limitation are to be construed *liberally* or *strictly* in the sense in which these words are technically understood, we find a learned judge and jurist of such high rank as Holloway, J., saying from the Bench of an Indian High Court in *Syed Ali Saib v. Sri Raja Sanyasiraz Peddabaliyra Simhulu Bahadur* (1) with reference to the matter :—"For myself I wholly repudiate interpretations, strict or liberal, according to the object-matter of the law. A barbarous code of penal laws was the parent of these doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too." These observations are no doubt original and deserve the highest respect; but with all due deference to the eminent authority from which they proceed, I am unable to accept them, partly because they contradict the almost universally recognised rules of the interpretation of statutes, and partly because our Indian Statute Book is still full of legislative enactments which require an ample application of the principle of interpretation which Holloway, J., repudiated. Moreover, that principle constitutes no infringement of the general rule of placing the ordinary grammatical construction upon the language of statutes, but comes into operation only when there is an ambiguity or indistinctness of meaning; for I suppose no one would maintain that where the language of the statute itself is

(1) 3 Mad. H. C. Rep. 5.

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express and clear, effect is not to be given to the words which indicate the intention of the Legislature. And I am prepared to accept for the interpretation of our Indian enactments the language used by Pollock, C.B, with reference to the distinction which Holloway, J., repudiated, that "it is unquestionably right that the distinction should not be altogether erased from the judicial mind"—a distinction which was recognised by the Calcutta High Court in *Empress* v. *Kola Lalang* (1) in interpreting a penal statute.

The question which still remains to be disposed of is whether, in this state of authority, our Limitation Act should be subjected to the rule of strict construction against its operation; and I have already said that, according to my view, the application of s. 14 of the Act to this case depends upon the decision of the question which I have just indicated. And because the matter is of such a consequence, I may say that I feel myself justified, as an Indian Judge sitting here, to resort to foreign authorities for the purpose of supporting my views upon a question in regard to which the Indian common law is silent, and which has not yet been made the subject of legislation. Under these circumstances it is necessary for me to refer to American authorities, and in the first place to a passage in Angell on the *Law of Limitation*, p. 17, and then to the *dictum* of Mr. Justice Story in *Bell* v. *Morrison* (7 Peters (U. S.) R. 360), and another of Mr. Justice M'Lean, both of which are referred to at p. 20 (4th ed.) of the same work :—"A statute of limitation," says Mr. Justice Story, "instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it, what it was intended emphatically to be, a *statute of repose*." Mr. Justice M'Lean, in giving the opinion of the Supreme Court of the United States in 1830, says:—"Of late years the Courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The Courts do not now, unless compelled by the force of the former decisions, give a strained construction, to evade the effect of those statutes." Again, there is the authority of Story, whose works are universally refer-

(1) I. L. R., 8 Calc, 214.

red to with respect in English Courts. At s. 576 of his *Conflict of Laws* the following passage occurs:—"In regard to statutes of limitation or prescription of suits and lapse of time, there is no doubt that they are questions strictly affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects or by or against foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal:—*Ne autem lites immortales essent, dum litigantes mortales sunt*". I adopt every word of the rules of substantial justice here laid down as distinguished from merely technical rules of procedure.

Applying these principles, I have no doubt, although the view is somewhat opposed to the doctrine recognised in England, and partly countenanced in this country, in the case of *Shah Keramut Hossein* v. *Golab Koonwur* (1), that in India, in interpreting Acts of Limitation, we are not bound by the rules established by a balance of authority in England. I may refer to the express provisions of s. 4 of the present Act, which place it beyond the power of the judge, as well as beyond that of the defendant, to ignore or waive

(1) 3 W. R., 401.

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the plea of limitation. The policy of that section is different from that adopted in the English law; for in England the law of limitation comes under the category of those rules, whether created by the statutes or by the common law, which exist for the benefit of parties, and which, like the plea of minority, may be waived by the person entitled to the benefit. I am not prepared to accept this view as applicable to India. According to our law, the rule of limitation cannot be waived. If this is so, the Limitation Acts are not to be construed as imposing burdens. They are emphatically "*statutes of repose*," especially where, as in India, the absence of effective registration laws, as to many important incidents such as births, marriages, deaths, and adoptions), would make the preservation of testimony and the ascertainment of facts in many cases next to impossible. In the case of *Mohummud Buhadoor Khan* (1) the Privy Council would not allow any exception to the general Law of Limitation to operate in favour of a minor at the time whose property had been confiscated during the mutiny. This shows that the interpretation to be placed on such laws must be strict in favour of their operation. How then is s. 14 of the Limitation Act to be understood? The original section on the subject was s 14 of the Act of 1859, which ran thus:—"In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." Here the most important expression is "*same cause of action*" and also "defect of jurisdiction or *other cause.*" These words, however, are ambiguous. The section was reproduced in s. 15 of the Limitation Act of 1871; and while its language was more or less preserved, the expression "same cause of action" was changed to "same right to sue." The expression "other cause"

(1) L. R., 1 Ind. Ap, 167.

was changed to "other cause of a like nature," and the words "is unable to try it" were added. This phraseology, however, still created considerable doubt, which was manifested in a number of cases, and finally, s. 14 of the present Act again reverts to the old expression "same cause of action" instead of "same right to sue," and changes "is unable to try it" into "is unable to entertain it." I venture to say that if ever there was an ambiguous clause it is this. In the first place, "cause of action" is a phrase which has given rise to more difficulty than almost any other. It may mean the title *plus* the injury, or, as it is often used in England, only *injuria* or the violation of right. Then the words "unable to entertain it" are almost equally vague, and the Legislature might well have added illustrations to make them definite. If I were to interpret s. 14 in a liberal sense, I should hold that the present claim refers to the same cause of action, *i.e.*, relates to the same dispute as the former litigation. This, however, it is not necessary for me to rule. But I base my judgment upon the words "good faith" and "other cause of a like nature." I am of opinion that the former litigation, so far as it related to the item now in suit, was not conducted in *good faith*, because I interpret that expression to mean with due care and caution; and if the plaintiffs had taken proper care, they might easily have known that they could not deduct from the mortgage-money the sum due upon a totally different account. Moreover, in that litigation it was found that the agreement set up by the plaintiffs was not proved. In the second place, having chosen to take the course they did, the plaintiffs were not "prosecuting a claim" as those words are used in s. 14. "Prosecuting" does not mean appropriating payments or accounts, as in this case, but endeavouring to recover by legal proceedings money or other rights which a defendant declines to recognise. Again, the plaintiffs having chosen to bring those items into litigation in that way, the Court in that case did deal with it as a matter subject to its jurisdiction. There is consequently no question as to "any cause of a like nature" as contemplated by s. 14.

For these reasons I am of opinion that the plaintiff is not entitled to the benefit of s. 14. I may before concluding refer to the judgment of Peacock, C. J., in *Chunder Madhub Chuckerbutty* v.

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Bissessuree Debea (1), where he shows that no defect arising from the plaintiff's ignorance of law constitutes a *bonâ fide* delay.

Again, my view is supported by the decision of the Calcutta High Court in *Rajendro Kishore Singh* v. *Bulaky Mahton* (2) and of the Bombay High Court in *Pirjade* v. *Pirjade* (3). The nearest authority is perhaps *Hafizunnessa Khaton* v. *Bhyrab Chunder Das* (4), where it was held that the pleading of a set-off by a defendant was not prosecuting a remedy within the meaning of s. 14 of the Limitation Act. I need only add that a plea of set-off is nothing but a plea to bar the plaintiff's decree *pro tanto*, unless, indeed, the set-off exceeds the amount claimed in value. In the present case there was no such set-off pleaded by a defendant, and the plaintiff cannot be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court, which, for want of juridiction or cause of a like nature, was unable to entertain the claim.

For these reasons I am of opinion that the first Court was right in dismissing the suit as barred by limitation, and I concur in the order proposed by the learned Chief Justice.

Appeal allowed.

1886 *May* 31.

Before Mr. Justice Straight, Offg Chief Justice, and Mr. Justice Mahmood.

BISHEN DAYAL AND OTHERS (DEFENDANTS) *v.* UDIT NARAIN (PLAINTIFF).*

Mortgage—Words creating simple mortgage—Bond—Interest after due date—Measure of damages.

A suit was brought in 1884 upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest at Re 1-8 per cent per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision :—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1 8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

Held that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the

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* Second Appeal No. 876 of 1885, from a decree of G J. Nicholls, Esq., District Judge of Ghâzipur, dated the 17th February, 1885, reversing a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 20th December, 1884.

(1) 6 W. R., 184
(2) I. L. R., 7 Calc., 367.
(3) I. L. R., 6 Bom. 681.
(4) 13 Calc. L. R., 214.

shares and interests of which it recited at the opening that the obligors were owners.

Held that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, *i e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke* v. *Fowler* (1) referred to.

Held that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Jwala Prasad* v. *Khuman Singh* (2) referred to.

The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances.

The facts of this case are stated in the judgment of the Court.

Mr. *J. E. Howard*, for the appellants.

Mr. *W. M. Colvin* and Mr. *Habibullah*, for the respondent.

STRAIGHT, Offg. C. J.—This is a suit brought upon a hypothecation-bond of the 27th April, 1875, for Rs. 462, executed by Nihang Rai, defendant, and Digambar Rai, his brother, in favour of the plaintiff. The amount of the bond, with interest at Re. 1-8 per cent per mensem, was to be repaid on the 18th June, 1875.

The claim of the plaintiff is for Rs. 462, principal, and Rs. 794-8-6, interest to date of suit,—in all for Rs. 1,256-8-6. The first set of defendants consists of Nihang Rai, one of the obligors, and his son Har Narain Rai, Bishen Dayal Rai, son of Digambar Rai, deceased, and his sons Lachmi Narain Rai, Jang Bahadur Rai, and Mahesh Narain Rai, Kali Charan Rai, also son of Digambar, and his son Lal Bahadur Rai.

The second set of defendants are alienees of the property sought to be brought to sale, but they are not concerned in the appeal, and it is unnecessary to set out their names. I should add, that of the first set of defendants Har Narain Rai, Jang Bahadur

(1) L. R., 7 H. L. 27. (2) I. L. R., 2 All 617.

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Rai, Mahesh Narain Rai, Lal Bahadur Rai, being minors, are represented by Lachmi Narain Rai as guardian *ad litem*. The defendants Bishen Dayal Rai, Kali Charan Rai, and Nihang Rai, pleaded, among other matters, that the consideration of the bond was not paid, that the claim is barred by limitation, and that the plaintiff is not entitled to interest after the due date of the bond at Re. 1-8 per cent. per mensem, because he has allowed it to accumulate owing to his own *laches*, in that he took no proceedings upon the bond until the month of November, 1884. Lachmi Narain Rai, for himself and the minor defendants, pleaded that the bond was not executed by Digambar Rai and Nihang Rai to raise money for the necessary expenses of the joint family, of which they and these defendants and their fathers were members; that they, therefore, are not liable to have their shares in the joint property sold; that all that could be sold would be the share and interest of Digambar Rai and Nihang Rai; and further, that the plaintiff cannot, for the reason urged by the other defendants, recover interest at Re. 1-8 per cent. per mensem. With regard to the pleas put forward by the other set of defendants, it is, for the reasons I have already given, unnecessary to deal. It will be convenient here to state that among the issues fixed by the first Court was one in the following terms:—"For what necessity was the money taken? Were the heirs of the executants in any way benefited thereby?" The Subordinate Judge who tried the case as the Court of first instance, being of opinion that the payment of consideration of the bond in suit was not satisfactorily established, dismissed the plaintiff's claim. From this decision an appeal was preferred to the Judge, who, being of a contrary opinion upon that point, and without reference to any of the other questions raised by the defendants, reversed the decree of the first Court and decreed the plaintiff's claim in full. It is from this decree of the Judge that the appeal before us has been preferred, and the pleas that were urged at the hearing were, to shortly state them, as follows:—*First*, that the terms of the bond by which the property was hypothecated were of so general a character that they did not constitute a legal hypothecation; *secondly*, that the plaintiff was not entitled to any interest after due date; *thirdly*, that in advertence to the plea raised by Lachmi Narain

Rai, for himself and the minor defendants, and to the issue fixed thereon by the first Court, the Judge should have tried the question whether the money obtained under the bond was used for family purposes. It was further urged, but no specific plea in appeal was taken to that effect, that as the plaintiff had allowed so long a period of time to elapse from the due date of the bond before bringing his suit, he was not entitled to interest, *post diem*, at the rate mentioned in the bond. With regard to the first of the above contentions, it does not appear to me to have any force. It seems to me that the passage in the bond—"Our rights and property in the aforesaid taluka of Rajapur shall remain pledged and hypothecated for this debt"—is sufficiently clear and explicit to constitute and create a charge upon the shares and interests of which it is recited at the opening of the instrument that the obligors are the owners. The first plea, therefore, in my opinion, fails. The contention set up by the second plea, which goes the length of asserting that the plaintiff is entitled to no interest at all for the use of his money, *post diem*, places the position of the defendants too high. It has been settled now by the highest authority in *Cooke* v. *Fowler* (1) that interest may be claimed after due date, but that such claim is in the nature of one for damages; and further, in the above case it was also ruled by the then Lord Chancellor, Earl Cairns, to the effect that, where parties agree for a certain rate of interest, up to the day of payment the same rate may be, though not necessarily, adopted in assessing the subsequent damages for non-payment, such rate being one that might be fairly presumed to afford a criterion of what the parties valued the use of the money at. With regard to the first of these propositions and to the contention of the plaintiff, I am not prepared to say that cases might not arise in which a jury or a judge might refuse to give a plaintiff any interest, *id est* damages, save a nominal amount, but the circumstances would have to be of a very exceptional character; as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. As to the second proposition, I think that in determining the amount of damages, the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed

(1) L. R., 7 H. L. 27.

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his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest as the basis on which to assess such damages. I have already expressed a view to this effect in a case which is relied on by the defendants—*Juala Prasad* v. *Khuman Singh* (1). For it is to be borne in mind that the principle upon which the obligee of the bond may recover interest after due date, does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. It therefore becomes a question by what standard the damages should be measured, and it is obviously impossible upon such a matter to lay down any general rule for guidance, as the decision of the question must in each case turn upon its own special circumstances. In the present case, the original loan of Rs. 462 was made for a very short period, and it might well be that for this short period and for pressing reasons the obligors were willing to pay at the rate of 18 per cent. per annum. But it does not necesssarily follow at all that they were willing to continue the loan at that rate, or that the use of the money over a protracted period of time was of the same value as for the shorter interval. Nor, under ordinary circumstances, could the obligee have reasonably looked to place his money out for a term of years at more than one rupee per cent. per mensem. Now, it is obvious that all these matters were such as should have been considered by the Judge before determining the amount to which the plaintiff was entitled. It is clear from the terms of the bond of the 27th April, 1875, that the provision as to payment of interest at Re. 1-8 per mensem had reference only to the period up to date of payment, and there was nothing in them from which any contract could be implied to pay interest, *post diem*, at the contract rate. The Judge below has, in fact, never considered or tried this part of the case, and it will be necessary to remand and issue to him for that purpose. To the extent I have above indicated, the second plea, taken in conjunc-

(1) I. L. R., 2 All. 617.

tion with the further plea which, as I have stated, was orally urged at the hearing, must prevail.

In reference to the third plea, the matter raised by it altogether escaped the attention of the Judge, and he has held all the first set of defendants indiscriminately and indistinguishably liable, without first determining the circumstances under which the loan was taken by Digambar Rai and Nihang Rai, and whether it was of a character and nature in respect of which those two persons, being the managing members of the joint family, could bind the other members. Moreover, there is nothing to show what the ages are of the minor defendants, and whether all of them were in existence at the time the bond of 1875 was made. Of course, those of them who were not born at that time would have no right to resist the plaintiff's claim. The third plea therefore must, I think, succeed.

Looking at the case, it appears to me that the most convenient and satisfactory course to adopt in regard to it will be to remand the following issues, under s. 566 of the Civil Procedure Code, to the lower appellate Court for findings :—

1. Under what circumstances, and for what purposes, was the Rs. 462 borrowed by Nihang Rai and Digambar Rai on the 27th April, 1875, and in what character did they borrow it, in what way was the money applied, and did Lachmi Narain Rai and the minor defendants benefit by its expenditure?

In determining this issue the Judge will necessarily have to find which of, if not all, the minor defendants were alive at the date of the loan.

2. In advertence to the remarks made by me in dealing with the second plea, to what amount in the shape of damages is the plaintiff entitled for the use of his money between the due date and the date of the institution of this suit?

The findings, when recorded, will be returned into this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

MAHMOOD, J.—I concur.

Issues remitted.

1886
June 21.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

TARSI RAM (DECREE-HOLDER) *v.* MAN SINGH AND OTHERS (JUDGMENT-DEBTORS) *

Execution of decree—Adjudication that execution is barred by limitati n—Finality of order—Civil Procedure Code, s. 206—*Amendment of decree—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *Nos.* 178, 179.

An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time. This order was upheld on appeal in March, 1885. While the appeal was pending the decree-holder in May, 1884, applied to the Court of first instance to amend the decree under s 206 of the Civil Procedure Code, and in December, 1884, the application was granted. In April, 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case.

Held that No. 179 and not No. 178 was applicable, that the order rejecting the application of the 19th February, 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting point of limitation, and that the application was therefore time-barred. *Mungul Pershad* v. *Grija Kant Lahiri* (1) and *Ram Kirpal* v. *Rup Kuari* (2) referred to.

Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code.

THE decree, of which execution was sought in this case, was dated the 2nd April, 1880. An application to execute the decree made on the 19th February, 1884, was refused on the 26th March, 1884, on the ground that it had not been made within the time allowed by law. The decree-holder appealed from this order. While the appeal was pending, he applied to the Court which passed the decree to amend it under s. 206 of the Civil Procedure Code. This application was granted on the 6th December, 1884. On the 25th March, 1885, the appeal was dismissed.

On the 2nd April, 1885, the decree-holder again applied for execution. The Court of first instance refused the application, and its order was affirmed on appeal by the decree-holder. It was contended before the lower appellate Court, on behalf of the decree-holder, that limitation should be computed from the date of the

* Second Appeal No. 13 of 1886, from an order of W. T. Martin, Esq., District Judge of Aligarh, dated the 15th September, 1885, affirming an order of Lala Ganga Prasad, Munsif of Koil, dated the 11th July, 1885.

(1) I. L. R., 8 Calc. 51; L. R., 8 Ind. Ap. 123.
(2) I. L. R., 6 All. 269; L. R., 11 Ind. Ap. 37.

amendment of the decree, the article of the Limitation Act applying being No. 178.

The decree-holder, in second appeal, raised the same contention.

Mr. *Shiva Nath Sinha*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

OLDFIELD, J.—The only ground taken in the memorandum of appeal is, that the application is one to which art. 178, and not 179, Limitation Act, applies ; but this is not so.

The application is to execute a decree dated the 2nd April, 1880, and is governed by art. 179. On the 19th February, 1884, the decree-holder applied to execute this decree, and it was held to be then barred by limitation.

He subsequently got the Court to amend the decree under s. 206, Civil Procedure Code, and now seeks to execute it as amended; but his decree had been held by an order to be barred by limitation before the amendment, and that order has become final in the matter of executing the decree.

This appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion. The decree sought to be executed was passed on the 2nd April, 1880, and was put into execution by an application dated the 19th February, 1884 ; but execution was disallowed by an order dated the 26th March, 1884, on the ground that it was barred by limitation, and that order was upheld by the Court of appeal on the 25th March, 1885. The adjudication thus became conclusive and final within the principle of the rulings of the Privy Council in *Mungul Pershad* v. *Grija Kant Lahiri* (1) and *Ram Kirpal* v. *Rup Kuari* (2). But in the meantime the appellant-decree-holder, during the pendency of his appeal, made an application, on the 12th May, 1884, to the Court of first instance, to amend the decree under s. 206 of the Civil Procedure Code, and the application was granted on the 6th December, 1884.

The present application was made on the 2nd April, 1885, for execution of the *amended* decree, on the contention that limitation

(1) I. L. R., 8 Calc. 51; L. R., 8 Ind. Ap. 123.
(2) I. L. R., 6 All. 269; L. R., 11 Ind. Ap. 37.

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should be calculated from the date of the amendment, but both the lower Courts have disallowed the application.

I agree with my learned brother Oldfield in holding that the lower Courts acted rightly in rejecting the application. Irrespective of the merits of the amendment itself, I hold that such amendment could neither revive the decree nor furnish a fresh starting point of limitation, whilst there is of course the further consideration that the question of the decree being barred had passed into *rem judicatam*, as I have already pointed out, with reference to the Privy Council rulings.

I now wish to add that the provisions of the last paragraph of s. 206, Civil Procedure Code, have given rise to some difficulty and doubt, and I cannot help feeling that it would have been conducive to clearness, and accuracy, and uniformity of procedure in the Mufassal Courts, if the Legislature had thought fit to frame the paragraph as a separate section, and to have introduced therein definite restriction and limits as to the time within which, and the stage when, the power of amending decrees might be exercised. For instance, if a decree has already become the subject of appeal, I do not think the first Court should amend it under s. 206, for the Full Bench of this Court in *Shohrat Singh* v. *Bridgman* (1) has held that the decree of the appellate Court is the only decree susceptible of execution, and the specifications of the decrees of the lower Courts as such may not be referred to and applied by the Court executing such decree. Again, in connection with this same section, I may refer to what I said in *Raghunath Das* v. *Raj Kumar* (2) and also in *Surta* v. *Ganga* (3), in both of which cases my judgments were upheld and approved by the Full Bench of this Court (I. L. R., 7 All., pp. 875 and 876). Those cases furnish good illustrations of the manner in which the power conferred by the section may be misapplied in the absence of more definite provisions prescribing rules for guidance. I may perhaps also add that the section should also contain an express provision to say that when a decree-holder has so far accepted a decree as framed as to to put it into execution, no amendment should be allowed, and the reason should be that the proper stage for such amendment is

(1) I. L. R., 4 All. 376. (2) I. L. R., 7 All 276.
(3) I. L. R., 7 All. 411.

passed .I may here quote what Markby, J., said in *Goluck Chunder Mussant* v. *Gunga Narain Mussant* (1) :—"It is the duty of the parties, or rather of their pleaders, when they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered by a circular order of this Court of the 19th July, 1867 (8 W. R. Civ. Cir. 2), that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties chose to allow so long a time as that allowed in this case to elapse, before they take any steps upon the decree, without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly presumed that they acquiesced in the decree, and that no alteration ought to be made subsequently." The rule laid down by Couch, C. J., in *Prince Mahomed Ruhim-ood-din* v. *Babu Beer Protab Suhai* (2) has almost a stronger tendency in the same direction.

Again, a Division Bench of this Court, in *Gaya Prasad* v. *Sikri Prasad* (3) held that an application for an amendment of decree under s. 206, Civil Procedure Code, was governed by three years' limitation under art. 178, sch ii of the Limitation Act. But I respectfully doubted the accuracy of the rule in the case of *Raghunath Das*, to which I have already referred; and my view was supported by the principle up n which the rulings of the other High Courts proceed—*vide Robarts* v. *Harrison* (4), *Kylasa Goundan* v. *Rimasami Ayyan* (5), *Vithal Janardan* v. *Rukmi* (6).

These observations may possibly prove of some service to the Legislature when considering the question of the amendment of the Civil Procedure Code.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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June 22.

BALBHADAR AND OTHERS (DEFENDANTS) *v.* BISHESHAR (PLAINTIFF).*

Hindu Law—Joint and undivided Hindu family—Joint and undivided property—Debts of deceased member—Liability of his interest.

J, a member of a joint Hindu family, left two sons, *R* and *S*. *S* borrowed money upon a simple bond, and, after his death, the obligee sued his

* Second Appeal No. 1469 of 1885, from a decree of R J. Leeds, Esq, District Judge of Gorakhpur, dated the 16th May, 1885, confirming a decree of Maulvi Abdul Razak, Munsif of Bansi, dated the 15th November, 1884.

(1) 20 W R. 111.
(2) 18 W. R. 303.
(3) I. L R, 4 All. 23.
(4) I. L R., 7 Calc. 333.
(5) I. L. R, 4 Mad. 172.
(6) I. L R, 6 Bom. 586.

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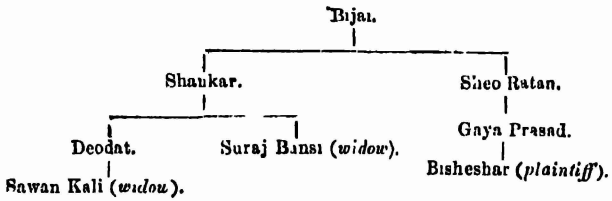
widow and daughter-in law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale *S's* interest in the property. *B*, the grandson of *R*, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of *S* and himself, and could not be attached and sold in satisfaction of *S's* debt.

Held that on the death of *S*, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of *S* when he had not obtained judgment against *S*, and taken out execution by attachment against him. *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) and *Rai Bal Kishen* v. *Rai Sita Ram* (2) referred to.

The following table throws light upon the facts of this case :—



Deodat died in the lifetime of his father Shankar, leaving a widow Sawan Kali. On the 11th March, 1877, Shankar executed a bond in favour of Ram Sahai defendant, the payment of which was not secured by the mortgage of property. Subsequently Shankar died, leaving a widow, the defendant Suraj Bansi. It appeared that Ram Sahai, then sued Suraj Bansi and Sawan Kali, as the legal representatives of the deceased Shankar, on the bond mentioned above. The suit was decreed on the 8th March, 1881, and in execution of the decree the rights and interests of Shankar, in the property now in suit, were sold on the 20th June, 1884, and were purchased by the defendant Sheo Sewak.

The plaintiff brought the present suit to be maintained in possession of the property purchased by Sheo Sewak, alleging that he, as the grandson of Shankar's brother Sheo Ratan, was a member of a joint Hindu family with Shankar up to the time of his death; that the deceased, as a matter of fact, did not die indebted at all; that the bond of the 11th March, 1877, had been fraudulently executed by Suraj Bansi; that the decree of the 8th March, 1881, passed on the aforesaid bond, was likewise collusively obtained by

(1) I. L. R., 5 Calc. 148; L. R., 6 Ind. Ap 88.

(2) I. L. R., 7 All. 731.

confession of judgment; that the sale of the 20th June, 1884, could not therefore affect the share of Shankar, which it purported to convey to the purchasers, the property being the undivided estate of a joint Hindu family, of which the plaintiff was the surviving member.

The Court of first instance gave the plaintiff a decree. On appeal by the sons of Sheo Sewak, who had died, the lower appellate Court decided that the plaintiff and Shankar were members of a joint and undivided Hindu family; that the question of Shankar's indebtedness under the bond of the 11th March, 1877, was not important, because the share of a member of a joint Hindu family could not be brought to sale in this manner after his death; and that the question of *bona fides* did not need determination in the case, as the plaintiff, who did not stand in the relation of lineal descent from Shankar, was not bound to pay his debts; and it accordingly upheld the decree of the Court of first instance.

In second appeal by the sons of Sheo Sewak it was contended on their behalf that the finding of the lower appellate Court as to the joint nature of the estate of Shankar with the plaintiff was erroneous; that the Court was bound to determine the *bona fides* of the bond of 1877; that the decree of the 8th March, 1881, was properly obtained by impleading Shankar's widow Suraj Bansi, who, according to the Hindu law, was a proper legal representative of her deceased husband, for the purposes of such a suit; and that the auction sale of the 20th June, 1884, therefore duly conveyed Shankar's share to the appellants.

Munshi *Hanuman Prasad* and Lala *Juala Prasad*, for the appellants.

Mr. *C. H. Hill* and Munshi *Kashi Prasad*, for the respondent.

MAHMOOD, J.—I may at once state that I am not at all disposed to disturb in second appeal the concurrent findings of the Courts below as to the joint and undivided nature of the family and of the property in suit. Nor do I think it is necessary for us to investigate the *bona fides* of the debt which the bond of 1877 purported to secure, because the case for the defence has all along been that the debt was a personal debt of Shankar, who

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was separate and divided from the plaintiff. There is absolutely no plea to the effect that the money was borrowed by Shankar as a managing member of a joint Hindu family, for the joint purposes of such family; and no such question having been raised, I think the learned Judge acted rightly in not entering into the merits of the *bona fides* of the bond, for the simple reason that the Hindu law imposes no liability upon the plaintiff to pay off the debts of his grand-uncle under such circumstances. Nor do I think it is necessary for us in this case to consider whether Musammat Suraj Bansi, the widow of Shankar, was rightly impleaded, as the representative of her deceased husband, in the suit which ended in the decree of the 8th March, 1881. For I think that the whole question in the present case is, whether, after the death of Shankar, any such estate was left by him as could be made liable for the payment of his debts, such as the one for which the auction-sale of the 20th June, 1884, took place.

In *Apporier* v. *Rama Subha Aiyan* (1) Lord Westbury, in delivering the judgment of the Privy Council, observed that "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided Hindu family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided" (p. 90). Such being the nature of the rights

(1) 11 Moo. I. A. 75.

and interests of a member of a joint Hindu family in the joint property, it was for a long time an unsettled question, whether such rights and interests could, on the one hand, be alienated by private sale by any individual member; and on the other hand, whether they could be brought to sale for his personal debts in execution of a decree. The former part of this question would seem to be still unsettled by the highest authority, unless the ruling of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1) be taken to afford a settlement of the matter; for the Lords of the Privy Council in *Phoolbas Koonwur* v. *Jogeshur Sahoy* (2) only referred to it, but abstained from giving any ruling. The question was again referred to by their Lordships, but not determined, in *Deendyal Lal* v. *Jugdeep Narain Singh* (3), which, however, settled the latter part of the question enunciated by me. In that case their Lordships drew a distinction between the power of private alienation possessed by a member of a joint Hindu family and the power of a Court to seize his share, at the instance of a judgment-creditor, in execution of a decree for personal debts. And I take that case to have finally decided the question in the affirmative, and to have ruled that the share of a member of a joint Hindu family possesses a seizable character for purposes of execution, and that when it is brought to sale, the purchaser at such execution-sale possesses the right of compelling the other members of the joint family to separate the debtor's share by partition. The same I understand to be the effect of a more recent ruling of their Lordships in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (4). But the case which needs special reference here is the ruling of their Lordships in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (5), which carried the rule somewhat further, inasmuch as it was there held that seizure by attachment in execution is sufficient to constitute, in favour of a judgment-creditor, a valid charge upon property to the extent of the joint member's undivided share and interest, and that such charge could not be defeated by his death subsequent to such attachment, though antecedently to the actual sale. In laying down this rule their Lordships disapproved of the

(1) I. L. R., 5 Bom. 48; L. R., 7 Ind. Ap. 181.
(2) I. L. R., 1 Calc. 226; L. R., 3 Ind. Ap. 7.
(3) I. L. R., 3 Calc. 198; L. R., 4 Ind. Ap 247.
(4) I L R, 10 Calc. 626.
(5) I. L R., 5 Calc. 148; L. R., 6 Ind. Ap. 88.

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ruling of this Court in *Goor Pershad* v. *Sheo Deen* (1), so far as that ruling ignored the seizable character of an undivided share in joint property, which had since been established by the ruling of the Privy Council in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (2), to which I have already referred. But the exact question here is not the same as in that of *Suraj Bunsi Koer* (3). Here, during the lifetime of Shankar, the bond of the 11th March, 1877, was never even sued upon: the decree of the 8th March, 1881, and the sale of the 20th June, 1884, took place when Shankar was no longer in existence. And in such circumstances the exact question before us is, whether Shankar left behind him any such rights at all as could either be seized in execution or be made the subject of an execution.

Fortunately this question needs no reference to original authorities, because I hold that the doctrine of the Lords of the Privy Council in the case of *Suraj Bunsi Koer* (3) is conclusive upon this point. Their Lordships observed :—" It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands."

These observations are, in my opinion, fully applicable to this case, and, indeed, go beyond the exigencies of what we have got to determine here, the plaintiff not being a son of the deceased Shankar, for whose personal debts his share was purported to be sold on the 20th June, 1884. And I hold that upon that date, Shankar having died even before the litigation which terminated in the decree of the 8th March, 1881, his share had already vanished and been taken by the plaintiff by right of survivorship, without being subject to the payment of Shankar's personal debts. I may perhaps also add that the family being joint, Musammat Suraj Bansi, the widow of Shankar, could have no such rights in her husband's share as could be affected by the sale in execution of the decree against her; whilst the fact of Musammat Sawan

(1) N.-W. P. H. C. Rep., 1872, p. 137.
(2) I. L. R., 3 Calc. 198; L. R., 4 Ind. Ap. 247.
(3) I. L. R., 5 Calc. 148, L. R., 5 Ind. Ap. 58.

Kali having also been impleaded in that suit, cannot, of course, help the defendants-appellants, purchasers of the execution-sale, she being the widow of Shankar's son who had pre-deceased his father.

For these reasons I would dismiss this appeal with costs.

OLDFIELD, J.—This suit relates to property left by one Bijai. He was succeeded by his sons Sheo Ratan and Shankar; the plaintiff represents the former. Shankar before his death borrowed money on a simple bond from one Ram Sahai, who after the death of Shankar sued his widow and daughter-in-law, and obtained a decree against them, and in execution brought to sale Shankar's interest in the property, and it was purchased by defendant-appellant.

The plaintiff is the grand-nephew of Shankar, and sues to recover the property sold at auction, on the ground that it was the joint property of Shankar and himself, and could not be taken and sold in execution of Shankar's debt.

The Courts have allowed the claim and the defendant has appealed.

The objection to the finding that the property was joint undivided property of Shankar and the plaintiff is not one which can be entertained in second appeal, the finding on this point by the Courts below being one of fact; and when it has been found that the property was undivided the appeal must fail. On the death of Shankar, his interest passed to plaintiff by survivorship, and was not liable after his death for any personal debt which he had incurred. No charge had been made on the property, and the creditor could not recover his money from the joint property after the death of Shankar, when he had not obtained judgment against Shankar, and taken out execution by attachment against him. I may refer on this point to the case of *Suraj Bunsi Koer* v. *Sheo Persad* (1) and *Rai Bal Kishen* v. *Rai Sita Ram* (2). The appeal will be dismissed with costs.

Appeal dismissed.

(1) I. L. R., 5 Calc. 148; L. R., 6 Ind. Ap. 88.

(2) I. L. R., 7 All. 731.

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June 22.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DEO DAT (DEFENDANT) *v.* RAM AUTAR (PLAINTIFF).*

Mortgage—Usufructuary mortgage—Pre-emption—Redemption—Interest—Act IV of 1882 (*Transfer of Property Act*), *ss* 51, 83, 84.

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

Uodan Singh v. *Muneri Khan* (1) dissented from. *Manik Chand* v *Rameshur Rae* (2), *Buldeo Pershad* v. *Mohun* (3), and *Ajudhia* v. *Baldeo Singh* (4) followed.

In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884.

Held that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

Semble that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali* v. *Mathura Kandu* (5) referred to.

*Second appeal No. 1755 of 1885, from a decree of J. M. C Steinbelt, Esq., District Judge of Azamgarh, dated the 7th August, 1885, confirming a decree of Babu Nihala Chander, Munsif of Azamgarh, dated the 21st March, 1885.

(1) 2 Calc. S. D. A. Rep. 85.
(2) N.-W. P S. D. A. Rep., 1865, vol. ii, 171.
(3) N.-W. P. H. C Rep., 1866, Rev. Ap., 30,
(4) I. L. R., 7 All. 674.
(5) I. L. R., 5 All. 187.

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Held, with reference to s. 84 of the Transfer of Property (Act IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage.

Held, with reference to the last paragraph of s. 51 of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut.

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The plaintiff in this case sued to recover possession of certain mortgaged property. The property, a share in mauza Chak Chaube, was mortgaged by the plaintiff on the 30th August, 1882, by way of conditional sale, to one Har Prasad for Rs. 699, for a term of two years ending on Jaith sudi 15th, 1291 fasli. Under the terms of the mortgage, the mortgagor delivered possession to the mortgagee and authorized him to receive the profits, which amounted to Rs. 40 per annum, in lieu of a part of the interest, which was fixed at one per cent. per annum; and in respect of the balance of interest, namely, Rs. 44, it was agreed that the mortgagor would pay the same in cash along with the principal on taking an account at the time of the redemption.

Under the terms of the *wajib-ul-arz* of the mauza the defendant Deo Dat brought a pre-emptive suit in respect of the conditional sale, and obtained a decree on the 5th February, 1883, which was finally upheld in appeal on the 14th February, 1884. In the meantime, on the 23rd August, 1883, the defendant executed his decree by depositing Rs. 699, the principal amount of the mortgage-money, and obtained possession of the property, being thus substituted for the original mortgagee. Matters stood thus, when the plaintiff, proceeding apparently under the provisions of s. 83 of the Transfer of Property Act (IV of 1882), deposited in Court on the 6th June, 1884, the sum of Rs. 699, being the principal sum of the mortgage-money, claiming the same to be adequate for redemption. Upon the objection of the defendant to accept the money on the ground that the deposit fell short of the amount of interest due on the mortgage, the plaintiff's case was struck off on the 15th August, 1884, the deposit remaining in Court. Subsequently the plaintiff made a further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole deposit amount to Rs. 743. The defendant again, by an application made on the

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16th September, 1884, refused to accept the deposited money, on the ground that it fell short of the entire sum due on the mortgage. The proceedings under s 83 of the Transfer of Property Act came to an end on the 28th November, 1884, when the Court rejected the plaintiff's application for summary redemption, but allowed the sum of Rs. 743 to remain a deposit in Court.

The present suit was instituted on the 26th January, 1885, having for its object recovery of possession of the property by redemption of the mortgage, on the ground that the deposited sum of Rs. 743 was all that was due on the mortgage. The suit was resisted upon the ground that the plaintiff did not properly tender the mortgage money to the defendant, nor did he make an adequate deposit in Court, and that the defendant having cultivated the land, he could not be ejected till the crops were cut and taken away.

The Court of first instance held that the sum of Rs. 743, to which the deposit amounted on the 21st August, 1884, was all that was due to defendant on the mortgage on that date ; and that the defendant, having executed his pre-emptive decree, by depositing Rs 699, the consideration of the conditional sale, on the 23rd August, 1883, was entitled to remain in possession till he had gathered and carried away the crops which he had sown.

The defendant appealed, contending that he was entitled to an additional sum of Rs 61-10-0 as interest on the mortgage money, and to Rs. 37-15-0 as costs, making a total sum of Rs. 99-9-0, which had been disallowed by the first Court. The lower appellate Court dismissed the appeal.

The defendant appealed to the High Court.

Mr. *J. Simeon*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

MAHMOOD, J.—The contention urged beforeus on the defendant's behalf raises three main points for determination :—

1. Whether the defendant was entitled to claim interest on the mortgage-money for the period between 30th August, 1882, the date of the mortgage, and the 23rd August, 1883, when he enforced his pre-emptive decree by depositing Rs. 699, the prin-

cipal consideration-money of the conditional sale in respect of which he enforced his pre-emption.

2. Whether the defendant was entitled to claim any interest after the 21st August, 1884, when the deposit by the plaintiff, under s. 83 of the Transfer of Property Act, amounted to Rs 743.

3. Whether, under the circumstances of this case, the defendant was entitled to costs.

I will dispose of each of these points in the order in which I have mentioned them The first of these questions depends upon the determination of a very important point of the law of pre-emption. That a successful pre-emptor stands in the shoes of the original vendee in respect of all the rights and obligations arising from the sale under which he has derived his title, is a question which stands upon an undoubted basis, for the right of pre-emption is nothing more or less than the right of substitution. This was pointed out by me at considerable length in *Gobind Dayal* v *Inayatullah* (1), where the Full Bench of this Court generally accepted my conclusions as to the nature of the pre emptive right. This, however, is not a point which is contested on either side in the argument of the learned pleaders for the parties. All that the learned pleader for the appellant contends for here is, that his client, having succeeded to, or rather been substituted for, the original conditional vendee, Har Prasad, is entitled to claim the benefit of all the conditions of the mortgage, and is, therefore, entitled to claim interest even for the period antecedent to the 23rd August, 1883, when he enforced his pre-emptive decree, by deposit of the consideration of the conditional sale under the decree of the 5th February, 1883. I am of opinion that this contention is wholly unsound. It is perfectly true that a successful pre-emptor becomes substituted for the original transferee. and thus becomes entitled to the benefits of the transfer. But it is equally true, and stands to reason, that those benefits cannot be claimed for any period antecedent to such substitution itself. The right of pre-emption as based upon the *wajib-ul-arz* partakes of the nature of those obligations which fall short of an interest in immoveable property, though they

(1) I. L. R., 7 All. 775.

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are annexed to the ownership of such property. The nature of such obligations is well described in s. 40 of the Transfer of Property Act, which I refer to only by way of analogical comparison. A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property, which he can take only upon duly making such payment.

This view of the law is supported by some cases to be found in the reports. There is a very old ruling—*Uodan Singh* v. *Muneri Khan* (1), where it was held that if *A* transfer lands to *B* by sale, and *C* afterwards come forward and establish his right of *shufa* or pre-emption, he will be entitled to the lands at the price paid for them by *B*, who will be compelled to refund the profit accrued during the period of his possession to *C*, receiving himself the purchase-money back from *A*. That was a case decided so long ago as 1813, and seems to have depended entirely upon the Muhammadan law of pre-emption. The judgment, however, contains no authority for the rule there laid down; and there can be no doubt that the ruling was erroneous, being opposed to the most authoritative texts of the Muhammadan law itself. Such indeed seems to be the view taken by the Sudder Court of these Provinces in *Manik Chand* v. *Rameshur Rae* (2), which was a suit based upon the *wajib-ul-arz*, and where the learned Judges held that the "pre-emptor could have no preferential right till he had tendered the full price, and therefore the defendant's intermediate possession could not be regarded as illegal." This ruling was followed by this Court in *Buldeo Pershad* v. *Mohun* (3), where the learned Judges, after referring to the rule of Muhammadan law of pre-emption, held it to be equitable, and then went on to say:—"The purchaser has in most instances paid the purchase-money; is he

(1) 2 Calc. S. D. A. Rep., 85. (2) N.-W. P. S. D. A. Rep., 1865, vol. ii., 171.
(3) N.-W. P. H. C. Rep., 1866, Rev. Ap., 30.

to lose all interest and profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption? and is the pre-emptor, who has kept his money in his pocket till it suited his purpose to exercise his right, to obtain profit, which will be the greater in proportion to his delay?"

The same rule was laid down by Straight, J., in *Ajudhia* v. *Baldeo Singh* (1), which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed; and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan law, have shown that the principle is a necessary consequence of the very nature and incidents of the right of pre emption itself.

Applying the principle to this case, it seems to me perfectly clear that till the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing Rs. 699—the consideration of the conditional sale of the 30th August, 1882—he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom. And it follows that my answer to the first question in the case must be that the defendant is not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883. This view, however, raises a subsidiary question, namely, that if the defendant is not entitled to interest for that period, who else is entitled to it? This is a question which we are not bound to determine in this case, but I think I may safely say, as a necessary consequence of the *ratio decidendi* adopted by me, that the proper person entitled to receive the interest for that period was Har Prasad, in whose favour the *bye-bil-wafa* mortgage of the 30th August, 1882, was originally executed, and who was dispossessed under the defendant's pre-emptive decree; and I think I may add that in passing that decree, the Court should have allowed the amount of interest above mentioned in addition to the principal mortgage-money. This view is based upon the same principle as my ruling in *Ashik Ali* v. *Mathura Kandu* (2), where it was held that the pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such

(1) I. L. R., 7 All. 674. (2) I. L. R., 5 All. 187.

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mortgage at the time it became absolute. Here the "price" which should have been allowed to Har Prasad under the decree of the 5th February, 1883, should have been the principal mortgage-money *plus* such amount of interest as might have been due on the mortgage up to the period fixed by the Court for enforcement of the pre-emptive decree. That decree, having now become final, cannot of course be interfered with in this case: but its effect was to enable the defendant to pre empt on payment of less money than he was entitled to. And I have no doubt that his present claim for interest antecedent to the 23rd August, 1883, when he executed the decree, is wholly unconscionable and opposed to equity.

The next question in the case is a very simple one, because the rule contained in s. 84 of the Transfer of Property Act (IV of 1882) furnishes a clear guidance. The section says that when a mortgagor has duly made deposit under the preceding section of all that is due on the mortgage, the interest on the mortgage money is to cease. Here the plaintiff deposited the principal sum of the mortgage-money on the 6th June, 1884, but that deposit was clearly inadequate and would scarcely entitle him to the benefit of s. 84 of the Act, even *pro tanto*. I will, however, not determine this point, because it is not raised here, and the plaintiff himself made a further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole deposit amount to Rs. 743, which has been found by the Court below to be all that was due on the mortgage on that date, and of which the defendant had due notice. The amount so deposited of course left out of account the interest for the period antecedent to the 23rd August, 1883, and to which, as I have already shown, the defendant was not entitled. The Courts below were, therefore, in my opinion, right in not allowing interest to the defendant after the plaintiff had, with due knowledge of the defendant, deposited the whole money due on the mortgage to the defendant. And I may also add, with reference to a subsidiary question in the case, that the Courts below did not act rightly in rendering the decree subject to the condition that the defendant was not to be evicted till the crops he had sown were cut. The rule applicable to such cases is clearly enunciated in the last paragraph of s. 51 of the Transfer of Property Act, which creates no bar to eviction in such a case, but only lays down that the transferee

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is entitled to the crops sown by him, and to free ingress and egress to gather and carry them. The decree in this case should have been framed accordingly, but I need say nothing more about the matter, because that part of the decree has not been made the subject of complaint before us by the plaintiff-respondent.

Then as to the question of costs, which has been made the subject of a separate ground of appeal by the defendant-appellant before us. S. 220 of the Civil Procedure Code gives ample power and discretion to the Court in connection with costs, and in the present case the defendant, having all along acted wrongly in declining to accept the plaintiff's deposit, and in giving up possession to him, was properly made liable for the plaintiff's costs by the Courts below.

I would dismiss this appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

Appeal dismissed.

APPELLATE CRIMINAL.

1886
June 28.

Before Mr Justice Straight, Offg. Chief Justice

QUEEN-EMPRESS *v* BALDEO AND OTHERS.

Accomplice—Corroboration—Dacoity—Possession of stolen property.

Criminal Courts dealing with an approver's evidence in a case where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen-Empress* v. *Ram Saran* (1), *Queen-Empress* v. *Kure* (2) and *Reg.* v. *Mullins* (3) referred to.

A, *B*, *M*, *R* and *N* were tried together on a charge under s. 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against *A*, *B*, and *M* there was the further evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to *R*, it was proved that he was present when *B* pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it.

Held, with reference to *A*, *B* and *M*, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to these particular persons.

(1) *Ante*, p 306. (2) Weekly Notes, 1886, p. 63.
(3) 3 Cox C. C. 526.

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Held that, inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on *R's* part, and, with regard to *N*, no property was found with him or produced through his instrumentality, both *R* and *N* ought to have been acquitted.

These were appeals from convictions by Mr. G. H. Pearse, Sessions Judge of Meerut, dated the 14th April, 1886. The appellants, Baldoo, Ram Bakhsh, Mir Singh, Amir Bakhsh and Amman were convicted, under s. 460 of the Indian Penal Code, of house-breaking by night, in the course of the commission of which offence one Bahal Singh was murdered by some of them.

The appellants were jointly tried with three other persons called Masita, Mohsam Khan and Jamna, who were acquitted, the last mentioned being charged under s. 411 of the Penal Code.

Bahal Singh was a man reputed to be possessed of considerable wealth in coin and ornaments. On the night of the 4th January, 1886, his house was broken into, and he was murdered and the house plundered. The only direct evidence against the appellants was the evidence of an accomplice called Ghariba. He stated that a dacoity on Bahal Singh had been contemplated for some time; that Baldeo, appellant, told him that he had five or six good men at his disposal, the three chaukidars Amman (appellant), Amir Bakhsh (appellant) and Masita, Mohsam Khan and his son, Ram Bakhsh (appellant), and asked him to get one or two men; that he enlisted Mir Singh Jat (appellant), a very powerful man; that Baldeo, who was a neighbour of Bahal Singh's, fixed the 4th January, as he found the house would be empty; that the gang assembled at about 7 or 8 P. M., after dark, and fixed the rendezvous for midnight, the three chaukidars going off meanwhile on their rounds; that five men, Baldeo, Ghariba, Mir Singh, Amir Bakhsh and Mohsam Khan, escaladed the wall; that Baldeo had brought a rope, with which they let down Mohsam Khan into the courtyard; that he opened the door of the staircase and they all got down, opening for the other three; that Baldoo was the guide entirely; that Mir Singh was told off to overpower Bahal Singh, which he did by leaping on him on his charpai and smothering him; that the property was in a room close to where Bahal Singh was sleeping; and that it was quickly removed and carried off to Baldoo's house and divided.

The nature of the evidence corroborating that of the accomplice, Ghariba, appears from the following extract from the Sessions Judge's judgment :—

"The corroborative evidence against Baldeo is that of the Sub-Inspector Narain Prasad, Rukha and Sohan Pal, as to his pointing out certain silver articles buried on the Jamna bank. This is also the evidence against his son, Ram Bakhsh. They both went together to point these things out. Fakir Chand and Harnam prove that Amir Bakhsh produced some '*kharas*' and a piece of wire from a ruined house. After Amman had denounced Ghariba, and Mir Singh and Ghariba, who had been swindled by Mir Singh and Baldeo in the division of the property, had made a clean breast of it, two Gujars, Jit and Sawant, were employed if possible to trace the property. Baldeo, as shown above, produced certain small things, and Mir Singh also admitted that he had some things which his uncle, Jamna, could give up. It may here be noted that Jit said he made promises to the different accused if they would disgorge, but those promises were in private conversation, and certainly carried none of the authority specified in s. 24, Evidence Act. Mir Singh named five articles, an '*arsi*,' '*chilas*,' '*gandas*,' '*balis*' and a '*polchi*,' all of silver. Jit and Sawant went with a third man to mauza Behari and told Jamna that Mir Singh had sent for these articles. Jamna gave them up all except the '*polchi*.' When the things were shown to Mir Singh in presence of the Inspector, he at once said that the '*polchi*' had not been sent."

The Sessions Judge further observed as follows :—"While the inquiry was on, there was apparently a competition among most of the accused to give a certain amount of information in the hope of securing impunity for themselves. Nothing of course in the nature of a confession made during the police inquiry can be put in evidence except so far as anything was elicited from it. Fakir Chand, for instance, proves that not only was Amman constantly frequenting Baldeo's house before the murder, but that Amman gave the first information concerning the complicity of Ghariba and Mir Singh to the two outside Jats. In consequence of this certain property was recovered from Mir Singh, and Ghariba was sufficiently alarmed to turn Queen's evidence, besides disgorging some of his share."

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The Sessions Judge was of opinion, referring to *Empress* v. *Kure*, that the circumstances which appear above were sufficient corroboration of the evidence of Ghariba to warrant the conviction of Baldeo, Ram Bakhsh, Amman, Amir Bakhsh and Mir Singh, the appellants, under s. 460 of the Penal Code. He acquitted Masita and Mohsam Khan, there being no corroborative evidence against them; and he also acquitted Jamna, who had been charged under s. 411 of the Penal Code in respect of the property delivered by him to the two Jats, Jit and Sawant.

Mr. *W. M. Colvin*, for Baldeo, Mir Singh and Ram Bakhsh, appellants.

The appellants Amir Bakhsh and Amman were not represented.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

STRAIGHT, Offg. C. J.—These are five appeals from a decision of the Judge of Meerut, passed on the 14th of April last, convicting the appellants under s. 460 of the Penal Code, and sentencing Baldeo and Mir Singh to transportation for life, and Amman, Ram Bakhsh and Amir Bakhsh to seven years' rigorous imprisonment. The five appellants were tried, along with three other persons, by name Masita, Mohsam Khan and Jamna, who were acquitted, for having, on the night of the 4th January last, been jointly concerned in the breaking into the dwelling-house of one Bahal *bania* of Kutana, in the course of the commission of which offence the said Bahal was murdered. The only direct evidence against the appellants is that of an approver, by name of Ghariba, but as to Baldeo, Mir Singh and Amir Bakhsh there is the further proof that they produced, or caused to be produced, certain portions of the property stolen on the night of the crime from the house of Bahal. I have already, in the case of *Queen-Empress* v. *Ram Saran* (1), entered at length into the question of the nature and extent of the corroboration to be required to make it safe or proper to act upon the evidence of an accomplice, and it would be a useless waste of time to repeat the remarks I then made. I entirely adhere to each and every one of them, and the learned Judge is in error in supposing that the view I took in the case of *Queen-Empress* v. *Kure* (2) was in any sense at variance with the

(1) *Ante*, p. 306. (2) Weekly Notes, 1886, p. 65.

rule I had already laid down, namely, that Criminal Courts, dealing with an approver's evidence in a case where several persons are charged, should require corroboration of his statements in respect of the identity of each of the individuals accused. In this connection I cannot do better than refer to the observations of one of the wisest and most practical minded Judges that ever sat on the English Bench, Mr. Justice Maule, in *Reg.* v. *Mullins* (1), which are singularly apposite to this country, where those who have to administer justice unfortunately know what a perverted ingenuity there is for concocting false charges, and supporting them by the most elaborately fabricated network of perjured testimony.

Says that learned Judge:—"I quite agree that the confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates. Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected, if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime."

In the present case, upon careful consideration of all the facts as to Baldeo, Mir Singh and Amir Bakhsh, I am not prepared to say that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of Ghariba's evidence of their participation in the dacoity as entitled the learned Judge to act upon his story in regard to those particular persons. But as to Ram Bakhsh, although he was present when his father Baldeo pointed out the place where some of the property was dug up, he does not appear to have said any-

(1) 3 Cox C.C. 526.

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thing or given any directions about it; and there is, in my opinion, no sufficient material to warrant the inference of guilty knowledge on his part. So with regard to Amman, no property was found with him or produced through his instrumentality, and under these circumstances I think that both he and Ram Bakhsh ought to have been acquitted.

I dismiss the appeals of Baldeo, Mir Singh and Amir Bakhsh, but, allowing those of Ram Bakhsh and Amman, acquit them and direct that they be released

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CRIMINAL REVISIONAL.

1886 *July* 1.

Before M. Justice Brodhurst

QUEEN-EMPRESS *v.* RAM NARAIN AND ANOTHER

Appeal, summary rejection of—Judgment of Criminal Appellate Court—Criminal Procedure Code, ss. 367, 421, 424, 439—*High Court's powers of revision—Delay in applying for exercise.*

The powers conferred by s 421 of the Criminal Procedure Code should be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Where a Sessions Judge rejected an appeal summarily under s 421 of the Code, by an order consisting merely of the words "appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing—*held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere.

THIS was an application for revision of an order of Mr. H. M. Bird, Joint Magistrate of Cawnpore, dated the 4th July, 1885, and of the order of Mr. W. Blennerhassett, Sessions Judge of Cawnpore, dated the 4th September, 1885, summarily rejecting, under s. 421 of the Criminal Procedure Code, an appeal from the Joint Magistrate's order. The facts of the case are stated in the judgment of the Court.

Pandit *Moti Lal*, for the applicants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

BRODHURST, J.—In this case Ram Narain and Ganeshi were convicted by the Joint Magistrate of Cawnpore under s. 342 of the Indian Penal Code, and were sentenced to pay fines of Rs. 200 and Rs. 100 respectively, or, in default of payment, to be rigorously imprisoned for three months. From these convictions and sentences, Ram Narain and Ganeshi each preferred an appeal. The Sessions Judge rejected the appeals summarily, his order, in each instance, consisting merely of the two words "appeal rejected."

Ram Narain and Ganeshi have now applied to this Court for revision of the orders of the lower Courts, and the 5th and last ground taken by them is "because the learned Sessions Judge was wrong in rejecting the appeal summarily without assigning his reasons for so doing."

This objection, if taken within a reasonable time, would, in my opinion, have been valid. The law, I consider, requires that a lower appellate Court in disposing of an appeal, and even in summarily rejecting an appeal under the provisions of s. 421 of the Criminal Procedure Code, should give reasons for so doing; and, so far as I am aware, no Criminal Appellate Court of these Provinces, other than that the proceedings of which are now objected to, is addicted to disposing of any appeal without giving reasons for doing so. It is laid down in s. 367, Chapter XXVI of the Criminal Procedure Code, that the judgment of a Criminal Court of original jurisdiction "shall contain the point or points for determination, the decision thereon, and the reasons for the decision;" and by s. 424 of the same Code—a section in the same chapter with s. 421, and only three sections after it—it is enacted that "the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate Court other than a High Court." The powers conferred by s. 421 of the Code should, I consider, be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Under the circumstances stated above, I should have reversed the orders of the Sessions Judge, and should have directed him to

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re-hear the appeals and dispose of them in accordance with law, had I not found that the application for revision was made with very great delay, that is, after the expiration of nearly nine months from the date of the lower appellate Court's orders. On this ground, and also because I think that valid reasons might have been given for dismissing or rejecting the appeals, I decline to interfere in this revision case and reject the application.

Application rejected.

PRIVY COUNCIL.

P. C.
1886
February 10.

MUHAMMAD ISMAIL KHAN (DEFENDANT) *v.* FIDAYAT-ÚN-NISSA AND OTHERS (PLAINTIFFS).

[On appeal from the High Court for the North-Western Provinces.]

Family custom—Wajib-ul-arz—Muhammadan Law—Appeal to Her Majesty in Council—Question of fact.

It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of first instance, found that this custom had not been proved to prevail in the family.

On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib-ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate, who held all the shares in the village, having caused an entry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained.

Held that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhamadan law of descent.

The appeal was not taken out of the rule as to the concurrent findings of two Courts, primary and appellate, on a question of fact.

APPEAL from a decree (21st April, 1881) of the High Court, confirming a decree (14th July, 1880) of the Subordinate Judge of Meerut.

Ghulam Ghaus Khan, of an ancient Biluch family in the Bulandshahr district, died in 1879, leaving one son, the appellant, and three daughters, the respondents, besides certain illegitimate children. Upon his death, his son took possession, and alleged a sole title to the inheritance by the custom of the family. Between the brother and the sisters, the question on this appeal was whether

* *Present:*—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

it had been proved that, by custom, the ancestral estate descended to a single heir in the male line, instead of to sharers according to the Muhammadan law of the Sunni sect to which the parties belonged. In the Court of first instance, when the respondents brought this suit, other children of Ghulam Ghaus Khan were joined as plaintiffs; and, altogether, the claim was made for 82 sahams, as portions, out of 96 sahams, representing the whole estate.

All obtained a decree in their favour, which, however, was maintained in the High Court only in favour of the three daughters, now respondents; the other plaintiffs being found to be of illegitimate birth. The latter did not appeal against the decision; but the defendant, the brother, appealed; and the principal question now raised related to the proofs given by him of the alleged family custom. Among these was an extract from the *wajib-ul-arz* of village Jhagir, pargana Dankaur, tahsil Sikandrabad, zila Bulandshahr, in which village Ghulam Ghaus Khan, in his lifetime, was the recorded proprietor of all the 20 biswas. This contained an entry dated the 12th September, 1870, to the effect that, after his death, his eldest son should be heir to, and should manage, all his estate; it being declared that two other sons, who, however, both died in their father's lifetime, should receive only maintenance.

Mr. *C. W. Arathoon* appeared for the appellant.

Reference was made to *Lekraj Kuar* v. *Mahpal Singh* (1), in which it was held that *wajib-ul-arziz*, or village administration papers, properly prepared and attested, were admissible to prove a custom of inheritance stated therein.

The respondents did not appear.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant in this case is the only surviving son of Ghulam Ghaus Khan, who died on the 6th November, 1879, and the respondents are his three daughters, who it is not disputed were legitimate. The suit was brought by the three respondents, together with one Nanhi Begam, who was alleged to be a wife of Ghulam Ghaus Khan, and her chidren, who were

(1) L. R., 7 Ind. Ap. 63, I. L. R., 5 Calc. 744.

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alleged to be legitimate. It has been found by the High Court that Nanhi Begam was not the wife of Ghulam Ghaus Khan, and that her children were illegitimate, and there is no question as to them in this appeal.

The plaint claimed on the part of the plaintiffs that they were entitled to 82 parts of the estate of the deceased, the whole being divided into 96 parts, that being the shares which they would be entitled to under the Muhammadan law, supposing all were entitled. The Subordinate Judge gave a decree in favour of all the plaintiffs for the 82 parts. The only part of the defence set up by the present appellant which it is now material to consider was that there was a family custom by which the eldest son was entitled to succeed to the whole of the property of the deceased. The Subordinate Judge found this custom was not proved. The present appellant, who was defendant, appealed to the High Court. The High Court, coming to the conclusion that Nanhi Begam and her children were not entitled to any share of the property, modified the decree of the lower Court and made a decree in favour of the appellant and the three respondents, dividing the property, as it then became necessary to do, in a different way. The property was divided into 35 parts, and 21 of these were given to the respondents, the plaintiffs, and the remainder to the present appellant, the defendant, the property being divided according to the Muhammadan law. The High Court also found, as the Subordinate Judge had found, that the family custom had not been proved.

The defendant has appealed to Her Majesty in Council, and the ground of appeal taken is that the High Court was wrong in finding that the custom was not proved Objections have been taken to the judgment of that Court, but when they are examined they appear to their Lordships to amount only to this, that they contest the propriety of the finding of the Court on the construction of the evidence. The principal argument turns upon the contents of what is called a *wajib-ul-arz*, which does not appear properly to be a document entitled to that name, but rather a document in the nature of an administration or testamentary paper, by which Ghulam Ghaus Khan indicated the way in which he

should like the property to be enjoyed after his death. It seems to be rather an attempt on his part to make a disposition of his property contrary to the Muhammadan law.

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The case appears to their Lordships to come within the rule that when there is a concurrent judgment of the two lower Courts upon a question of fact, it ought not to be disturbed; and their Lordships will therefore humbly advise Her Majesty to dismiss the appeal and affirm the decision of the High Court. There will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow* and *Rogers*.

CIVIL REVISIONAL.

1886 *July* 1.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DHAN SINGH (JUDGMENT DEBTOR) *v.* BASANT SINGH AND OTHERS (DECREE-HOLDERS.)*

High Court's powers of revision—Civil Procedure Code, s. 622—Meaning of "jurisdiction"—Amendment of decree—Civil Procedure Code, s. 206—Act XV. of 1877 (Limitation Act), sch. ii, No. 178.

In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May, 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it.

Held that the application for revision must be rejected.

Per OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and of the Full Bench in *Badami Kuar* v. *Dinu Rai* (2), and further that, upon the facts stated, the Court ought not to interfere.

Per MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan*

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* Application No. 98 of 1886, for revision, under s. 622 of the Civil Procedure Code, of an order of Maulvi Mazhar Husain, Munsif of Nagina, dated the 5th May, 1885.

(1) I. L. R., 11 Calc. 6. (2) *Ante*, p. 111.

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v. *Sheo Bakuh Singh* (1), *Badami Kuar* v. *Dinu Rai* (2), *Raghunath Das* v. *Raj Kumar* (3), *Surta* v. *Ganga* (4), *Magni Ram* v. *Jiwa Lal* (5), *Har Prasad* v. *Jafar Ali* (6) referred to. *Bhagwant Singh* v. *Jageshar Singh* (7), and *Abu Said Khan* v. *Hamid-un-nissa* (8) dissented from.

The meaning of the term "jurisdiction" used in s 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe* v *Edwards* (9) and *Crepps* v. *Durden* (10) referred to.

Held also per MAHMOOD, J, that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622. *Lucas* v. *Stephen* (11), *Oomanund Roy* v. *Maharajah Sutish Chunder Roy* (12), *Zuhoor Hossein* v. *Syedun* (13) and *Goluck Chunder Mussant* v *Ganga Narain Mussant* (14) referred to.

Under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. S 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Roberts* v. *Harrison* (15), *Vithal Janardan* v. *Rakmi* (16), and *Kylasa Goundan* v. *Ramasami Ayyar* (17), referred to.

The facts of this case are stated in the judgments of the Court.

Munshi *Hanuman Prasad*, for the petitioner.

Babu *Ratan Chand*, for the opposite party.

(1) I. L. R, 11 Calc 6.
(2) *Ante*, p. 111.
(3) I L. R., 7 All. 276.
(4) I. L R, 7 All. 411.
(5) I. L. R., 7 All. 336.
(6) I. L. R., 7 All. 345.
(7) Weekly Notes, 1886, p. 57.
(8) Weekly Notes, 1886, p. 39.
(9) L. R, 3 P. D. 103.
(10) 1 Smith's L. C., 8th ed. 711.
(11) 9 W R. 301.
(12) 9 W. R 471.
(13) 11 W. R. 142.
(14) 20 W. R. 111.
(15) I. L. R., 7 Calc. 333.
(16) I. L. R., 6 Bom. 586.
(17) I. L. R., 4 Mad. 172.

OLDFIELD, J.—This is an application to revise, under s. 622 of the Civil Procedure Code, an order passed under s. 206, amending a decree.

The decree is dated the 10th July, 1872; it was for partition of immoveable property, and it appears that applications to execute were made on the 20th June, 1875, on the 10th June, 1876, and on the 9th June, 1879, when a dispute arose as to the execution in reference to a portion of the property, and the Court held that the decree was defective in its description of the property, and therefore incapable of execution. The final order was made by this Court on the 13th July, 1881. On the 8th February, 1882, the decree-holder sought to execute the decree in respect of other property, but execution was refused under an order by this Court dated the 17th March, 1884.

The decree holder then applied, on the 23rd February, 1885, to amend the decree, and the amendment was made on the 5th May, 1885. It is not disputed that the amendment has reference to an arithmetical error, and is one which could properly be made under s. 206.

The application, therefore, was properly one coming under the provisions of the section, and which the Court had jurisdiction to entertain under s. 206.

The Court's order, therefore, is not open to any objection on the score of want of or excess of jurisdiction, and there is, therefore, no power in this Court to entertain this application under s. 622 of the Civil Procedure Code, with reference to the Privy Council decision in *Amir Hassan Khan* (1), and that of the Full Bench of this Court in *Badami Kuar* v. *Dinu Rai* (2). In the last, the meaning of the Privy Council in the case above-mentioned was fully considered, and it was thus expressed by Petheram, C. J.—"I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its finding as to facts." That view was taken by the Full Bench

(1) I. L. R., 11 Calc. 6. (2) *Ante*, p. 111.

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of this Court of the scope and powers of the Court under s. 622, and is binding on us for dealing with cases coming under s. 622. The Court, in the case before us, was within its jurisdiction in amending the decree under s. 206; and whether or not it erred in entertaining the application on the ground of its being barred by limitation or other grounds, these are questions which do not affect the jurisdiction of the Court, so as to enable this Court to interfere under s. 622.

I may add, however, that, on the facts stated to us, this is not a case in which, having regard to the facts, I should be inclined to interfere. The application is dismissed with costs.

MAHMOOD, J.—I confess I am wholly unable to accept the preliminary objection urged on behalf of the respondent, to the effect that s. 622 of the Civil Procedure Code does not empower us to interfere in revision with any kind of orders passed by the lower Courts under s. 206 of the Code. This is not the first time that such a question has been raised before me, for I had to consider the matter on two former occasions. The first was the case of *Raghunath Das* v. *Raj Kumar* (1), and the other was *Surta* v. *Ganga* (2), and on both those occasions I stated the reasons in my dissentient judgment why the revisional powers of this Court should be exercised under s. 622 of the Civil Procedure Code. In both those cases my view of the law was upheld by the Full Bench of this Court (I. L. R., 7 All., pp. 875 and 876), and in both those cases the amending order was set aside as *ultra vires*.

But, then, it is argued that the Full Bench ruling of this Court in *Magni Ram* v. *Jiwa Lal* (3), which followed the Privy Council ruling in *Amir Hassan Khan* v. *Sheo Baksh Singh* (4), is decisive upon the point, and restricts the revisional jurisdiction of this Court to pure questions of jurisdiction. Further, it is argued that the rule has been narrowed even further by a more recent Full Bench ruling of this Court in *Badami Kuar* v. *Dinu Rai* (5), where the view of Petheram, C.J., was adopted by the whole Court, though Straight, J., delivered a separate judgment not consistent with the opinion of the learned Chief Justice, but surrendered

(1) I. L. R., 7 All. 276.
(2) I. L. R., 7 All. 411.
(3) I. L. R., 7 All. 336.
(4) I. L. R., 11 Calc. 6.
(5) *Ante*, p. 111.

his own views, as he regarded the question as simply one of practice. With all the learned Judge said on that occasion in illustrating the effect of s. 622 of the Civil Procedure Code, I entirely concur, but I respectfully think that the matter before the Court was not one of practice, but a matter affecting the revisional jurisdiction of this Court—a jurisdiction the importance of which I cannot express in better language than in the words of Straight, J., himself:—"I need only add that, in my opinion, if there is one power which it is of the first importance that the Court should possess, it is the power of sending for the record in civil cases where no appeal lies. Experience shows that in a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below; and it is essential that in such cases the High Court should have the power of interference."

The ruling of Petheram, C. J., however, in which the rest of the Court concurred, is expressed in these words:—

"The section has been considered by the Privy Council in the case of *Amir Hassan* v. *Sheo Baksh Singh* (1) and the Full Bench of this Court in the case of *Magni Ram* v. *Jiwa Lal* (2), and the result of those cases, in my opinion, is that the questions to which s. 622 applies are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law; and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts, but that, when no appeal is provided, its decision on questions of both kinds is *final*."

And perhaps the best way to illustrate how these words have been understood by two of the learned Judges themselves who were parties to the last Full Bench ruling, is to cite the case of *Bhagwant Singh* v. *Jageshar Singh* (3), the effect of which I understand to be, that a Court having jurisdiction to hear a suit may say that it has no jurisdiction to hear it, and that its view as to

(1) I. L. R., 11 Calc. 6. (2) I. L. R., 7 All. 336.
(3) Weekly Notes, 1886, p. 57.

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the want of jurisdiction, though erroneous, must be accepted as final and beyond the revisional jurisdiction of this Court under s. 622 of the Code. The same I understand to be the effect of the ruling of the same learned Judges in *Abu Said Khan* v. *Hamid-un-nissa* (1), in which the last Full Bench ruling was expressly cited as an authority for not interfering.

Now, I must say with all due respect that I find it impossible to agree in the rule laid down in either of these two cases, and the best manner in which I can state my reason for this view is to go back to the Full Bench ruling in the case of *Magni Ram* (2), to which I was a party, and in which I concurred in the somewhat laconic judgment which Petheram, C. J., delivered in that case. Soon after I found it necessary—because the ruling was being constantly misunderstood—to state my reasons why I had concurred in that ruling, and I did so in *Har Prasad* v. *Jafar Ali* (3), which has been fully reported. In that case I stated at considerable length by way of illustration the class of cases to which the provisions of s. 622 of the Civil Procedure Code would apply, and I also explained how I understood the words "questions relating to the jurisdiction of the Court" as used in the Full Bench case of *Magni Ram* (2), and the manner in which I interpreted the meaning of the word "jurisdiction" as used by their Lordships of the Privy Council in the case of *Amir Hassan Khan* (4). But it is contended that the last Full Bench ruling of this Court in *Badami Kuar's Case* (5) has overruled all the previous rulings, including the three cases in which I had delivered separate judgments, and in two of which, as I have already stated, my view of the law was unanimously accepted by the Full Court. Now, if those judgments of mine have been actually overruled by the Full Court, I should, of course, bow to the decision. But I find from the report of *Badami Kuar's Case* (5) that none of the rulings of this Court to which I have referred were considered, with the exception of the Full Bench ruling of this Court in *Magni Ram's Case* (2), where in the judgment the word "jurisdiction" occurs, and, as I showed in the case of *Har Prasad* (3), is the turning-point of the interpretation of that ruling. Yet the exact application of the word to such cases

(1) Weekly Notes, 1886, p. 39.
(2) I. L. R., 7 All. 336.
(3) I. L. R., 7 All. 345.
(4) I. L. R., 11 Calc. 6.
(5) *Ante* p. 111.

was, I respectfully think, not explained in the last Full Bench ruling in the case of *Badami Kuar* (1), and the result is that, as I understand that ruling, it has left the matter exactly where the former Full Bench case of *Magni Ram* (2) had left it. At least this is the only manner in which I can understand the ruling of Petheram, C. J., in the case of *Badami Kuar*, for I find it impossible to conceive that the learned Chief Justice was either unaware of my rulings in the cases of *Har Prasad* (3), of *Surta* (4) and *Raghunath Das* (5), or that he intended to overrule them without expressly referring to them in his judgment. Indeed, he could not have overruled two of them without having overruled two Full Bench judgments to which he himself was a party, and which judgments had not only accepted my conclusions, but also the reasons upon which they proceeded.

In this condition of the case-law of this Court, I decline to accept the contention that the last Full Bench ruling in the case of *Badami Kuar* (1) has swept away the whole of the antecedent case-law of this Court, and all I feel myself bound to do is to interpret the judgment of Petheram, C. J., in that case as best I can. And in doing so the word "jurisdiction" as used by his Lordship is again the turning-point of the exact meaning to be attached to his ruling. I fully agree with him when he says "that the questions to which s. 622 applies are questions of jurisdiction only." But then the question is, what does jurisdiction mean? The learned Chief Justice went on to say that the effect of the Privy Council ruling was "that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final." I have no hesitation whatsoever into accepting this enunciation of the law, provided that the word "jurisdiction," wherever it occurs in this passage, is to be understood in the sense in which I interpreted it in the case of *Har Prasad* (3). The learned Chief

(1) *Ante*, p. 111.
(2) I. L. R., 7 All 336.
(3) I. L. R., 7 All. 345.
(4) I. L. R., 7 All 411.
(5) I. L. R., 7 All. 276.

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Justice's ruling gives no information as to whether that interpretation was right; so long as there is no authoritative ruling binding upon me, which says that my interpretation was wrong, I have no reason to think so. On the contrary, considering that in two of the cases which proceeded upon the same interpretation, the Full Bench has approved my judgments, which judgments again have never been overruled, I think I am justified in saying, notwithstanding the case of *Badami Kuar* (1), that my interpretation of what constitutes questions relating to jurisdiction is right, and I still adhere to that interpretation. At any rate, as I have already said, with due respect, I am unable to accept the view taken by two learned Judges of this Court in the cases of *Bhagwant Singh* (2) and *Abu Said Khan* (3), which go the length of laying down that even wrongful assumption of jurisdiction, or wrongful refusal to exercise jurisdiction, are matters which fall beyond the scope of s. 622. According to my humble opinion, such a view is not only not deducible from, but opposed to, the judgment of Petheram, C. J., in the last Full Bench ruling in the case of *Badami Kuar* (1), and that the effect of such a view would be to abrogate the whole section 622 itself. For the view comes to this, that a Court having jurisdiction may wrongly say that it has no jurisdiction; and a Court having no jurisdiction may wrongly say that it has jurisdiction; and yet such erroneous refusal or assumption of jurisdiction could not be interfered with under s. 622 of the Code, because—to use the language employed in one of the judgments—"the Court had jurisdiction to decide, and was bound to decide, whether the suit was or was not within its cognizance." Yet in the last Full Bench case of *Badami Kuar* (1) itself the Court interfered because the Munsif had wrongly declined to exercise jurisdiction.

I have dwelt upon this matter at such length because I cannot help feeling, with profound respect, that neither the Full Bench ruling in the case of *Magni Ram* (4) nor the last Full Bench ruling in the case of *Badami Kuar* (1) is sufficiently explicit to place the exact scope of s. 622 beyond doubt, and the doubt has all along arisen over the exact manner in which the word "jurisdiction" as used by their Lordships of the Privy Council in the case of *Amir*

(1) *Ante*, p. 111.
(2) Weekly Notes, 1886, p. 57.
(3) Weekly Notes, 1886, p. 39.
(4) I. L. R., 7 All. 336.

Hassan Khan (1) is to be understood. In the case of *Har Prasad* (2), I think I said enough to show from the judgment of their Lordships themselves that they employed the word not in the narrow sense in which it is sought to be interpreted here, limiting it to territorial or pecuniary limits, and to questions relating to the nature of the suit, but in the comprehensive sense in which that word is understood as a term of English law. Now it is not for me, to whom English is a foreign tongue, to interpret the meaning of the English word, and I have, therefore, referred to Wharton's "Law Lexicon" in order to ascertain the exact meaning in which the word is used in its legal sense, and that work explains "jurisdiction" to mean "legal authority; extent of power; declaration of the law;" and it is in this sense that I understand it as used by the Lords of the Privy Council in the case of *Amir Hassan Khan* (1), and I said so in the case of *Har Prasad* (2). Further, if there is any doubt about the matter, I would refer to the judgment of Lord Penzance in the celebrated case of *Combe* v. *Edwards* (3), where the word "jurisdiction" constantly occurs, not only in his Lordship's own judgment, but in the passages to which he refers from earlier cases, and I think I may safely say that the word is used throughout in the comprehensive sense in which Wharton has explained it. And, indeed, if any further authority is required for my view, I will resort to no less an eminent authority than Lord Mansfield himself, whose use of the word in the leading case of *Crepps* v. *Durden* (4) seems to me to be wholly consistent with the meaning which I humbly think the word has, and in which sense I understand it to have been used by the Lords of the Privy Council in *Amir Hassan Khan's Case* (1). But because the interpretation of the Privy Council ruling depends upon the exact interpretation of the word, and also because much divergence of opinion apparently prevails both among the members of the Bench and of the Bar, I think it will not be out of place to quote a whole passage from the judgment of Lord Mansfield in the case above referred to, in order to illustrate the exact manner in which his Lordship understood and used the word "jurisdiction" as a term of law. His Lordship said:—

(1) I. L. R., 11 Calc 6.
(2) I. L. R., 7 All. 345.
(3) L. R., 3 P. D. 103.
(4) 1 Smith's L. C., 8th ed., 711.

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"The first question is, 'whether any objection can be made to the legality of the convictions before they were quashed.' In order to see whether it can, we will state the objection: it is this—that here are three convictions of a baker for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the Act of Parliament the offence is 'exercising his ordinary trade upon the Lord's Day,' and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consists of one or a number of particular acts, the penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself, that if a tailor sews on the Lord's Day, every stitch he takes is a separate offence; or if a shoemaker or carpenter works for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: killing a single hare is an offence, but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here repeated offences are not the object which the Legislature had in view in making the statute, but simply to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had *no jurisdiction whatever* in respect of the three last convictions."

Having read this passage with the greatest care, I find it wholly impossible to doubt that Lord Mansfield, in saying that "the justice had no jurisdiction whatever in respect of the three last convictions," meant that the statute, then under consideration, did not *empower* the justice to convict more than once for trading on one Sunday, and that therefore the other three convictions were opposed to the Act, were *ultra vires*, and therefore made "without jurisdiction." Is it possible to conceive that the word would have been employed in such a manner and in such a case if its meaning were confined to territorial or pecuniary limits, or to the nature of

the class to which the case belongs? The case was undoubtedly of a nature cognizable by the justice, and the only question was whether the law authorized him to convict a person more than once for trading on the same Sunday. Lord Mansfield found that the statute did not so authorize the justice, that his action went beyond the authority of the law; it was therefore *ultra vires*, and his Lordship denominated such an action to be without any jurisdiction whatever.

This is the sense in which I understand the use of the word by the Lords of the Privy Council in *Amir Hassan Khan's Case* (1), and by Petheram, C. J., in the Full Bench cases of *Magni Ram* (2) and *Badami Kuar* (3), and this is the sense in which I interpreted it in the case of *Har Prasad* (4). And to what I said in that case I may add the two very apt illustrations given by Straight, J., in *Badami Kuar's Case* (3) of what would constitute a question relating to the exercise of jurisdiction "illegally and with material irregularity" within the meaning of s. 622 of the Code; and I may add that the cases of *Surta* (5) and *Raghunath Das* (6), which have received the approval of the Full Bench of this Court, furnish further illustration of cases to which the revisional power of this Court under s 622 would apply. I do not think any further illustrations are necessary, and I need only summarize the effect of all that I have said in this and the preceding cases as to the exact manner in which I understand what constitutes questions relating to the exercise of jurisdiction for purposes of revision. Such questions may refer to the following points:—

(i) Territorial limits of jurisdiction.

(ii) Pecuniary limits of jurisdiction.

(iii) Jurisdiction with reference to the nature of the class to which the case belongs.

(iv) Presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the three preceding conditions.

The last is really the only point upon which my views have been doubted, but for such doubt no room is left after reading what I

(1) I. L. R., 11 Calc. 6.
(2) I. L. R., 7 All. 336.
(3) *Ante*, p. 111.
(4) I. L. R., 7 All. 345.
(5) I. L. R., 7 All. 411.
(6) I. L. R., 7 All. 276.

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have already quoted from Lord Mansfield's judgment. If a conviction wholly unauthorized by law furnishes a case of want of jurisdiction, I fail to conceive why an action by a civil tribunal, in a manner equally unauthorized, or, may be, positively prohibited by law, should not be held to be a question relating to the want of, or the illegal and irregular exercise of, jurisdiction. I entirely fail to see any difference in principle between the two kinds of cases here contemplated. For instance, take the provisions of s. 111, which authorizes the Court to allow a set-off only in a certain limited class of cases and subject to certain specific restrictions. The suit must be "*for the recovery of money*," and the subject of set-off must be an "*ascertained sum of money legally recoverable*" from the plaintiff. The power conferred by the section is denominated throughout in Courts of Chancery as one kind of "equity jurisdiction"—a phrase which would be unintelligible if the fourth point enumerated by me was not included within the meaning of the word *jurisdiction* (Story, "Eq Juris.," 11th ed., s. 1430—34). Again Mr. Justice Story's work is full of phrases in which he uses the word *jurisdiction* in the sense of authority and power. For example, in s. 1431 he has the following:—"And, in the first place, let us consider the subject of *set-off* as an original source of equity jurisdiction. It is not easy to ascertain the true nature and extent of this *jurisdiction*." Now, if the power to allow set-off is a matter of "jurisdiction," I should say that where the action of a Court which allows set-off is in direct contravention of the restrictions imposed upon its authority by s. 111, which creates that authority, the matter would be a proper subject for revision under s. 622 of the Code.

I have thus the authority of Lord Mansfield, Lord Penzance, and Mr. Justice Story for the comprehensive meaning which I attach to the use of the word "jurisdiction," as a legal term, in the English language. Nor am I aware of any authority which has used the word in any other sense. And so long as I understand the word in the sense in which such eminent authorities have understood and used it, so long shall I hold that the Legislature, in framing s. 622 of the Civil Procedure Code, gave us the authority, the power and the jurisdiction to interfere in the action of the tribunals subordinate to this Court in cases where there is no remedy either by appeal or otherwise, and where those tribunals

have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. And I humbly say, Understand the word "jurisdiction" in the judgment of the Lords of the Privy Council in *Amir Hassan Khan's Case* (1) as a legal expression having a definite meaning in the language and in the country in which their Lordships delivered the judgment, and no difficulty or inconsistency arises between what their Lordships said and the express letter of the statute. The case before their Lordships was one in which two tribunals having full jurisdiction to deal with the case, and in the exercise of such power and authority as that jurisdiction conferred upon them, had come to the definite conclusion that the property which was then in litigation had not been the subject of any such previous adjudication as would furnish a basis for the plea of *res judicata*. The judgments of the two tribunals were concurrent, and under the Oudh Civil Courts Act they were final. The Judicial Commissioner interfered with them under s. 622, as the High Court of that province, and their Lordships of the Privy Council declared that "the Judicial Commissioner had no *jurisdiction* in the case." Surely not in the limited sense to which the word is sought to be confined here, but in the broad sense of want of authority and power under the law; in other words, in the sense in which it is understood in England. The effect of that ruling, as I have once before fully explained in *Har Prasad's Case* (2), is not to divest this Court of its revisional power of interference in cases where the subordinate tribunals have totally disregarded, either in the affirmative or in the negative, the limits of the authority and power conferred upon them by law, or have acted in contravention of a positive prohibition. For instance, the law says an immoral contract shall not be enforced, because it is opposed to public policy, and if a Court, in direct contravention of this prohibition, enforces such a contract, there would, of course, be no question relating to any of the first three points which I have above enumerated in connection with jurisdiction; but the action of the Court would relate to the fourth point, and this Court could

(1) I. L. R., 11 Calc. 6. (2) I. L. R., 7 All. 345.

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interfere in revision, because the Court below had no legal authority and no power under the law to enforce a contract which the Legislature in its wisdom had said shall not, under any conditions, be enforced.

Such, then, are my views in connection with the scope of s. 622 of the Civil Procedure Code; such is my interpretation of the ruling of the Privy Council in *Amir Hassan Khan's Case* (1); and such also is my interpretation of the Full Bench rulings of this Court in the cases of *Magni Ram* (2) and *Badami Kuar* (3), and in the cases of *Surta* (4) and *Raghunath Das* (5). And reading these various cases as I have done, I do not find myself precluded from entering into this case for the purpose of satisfying myself whether the jurisdiction assumed in this case by the lower Court, purporting to act under s. 206 of the Civil Procedure Code, was rightly assumed; and if so, whether its action in amending the decree did not exceed the authority and power which that provision of the law conferred upon that Court, and also whether that Court has not acted against some positive prohibition of the law. I therefore entertain this petition in revision, and I will dispose of it upon what can be shown on either side in the case. And I proceed to consider what actually happened here.

The original decree in the case was passed on the 10th July, 1872, in a suit for partition of certain pieces of land. The decree, *inter alia*, declared the plaintiff entitled to land, 27 yards by 25 yards in length and breadth. This would yield an area of 675 square yards, but the decree described it to be 925 square yards, apparently in accordance with the statement in the plaint.

The decree does not appear to have been appealed from; but the inconsistency of the figures above stated was detected, apparently for the first time, on the 16th February, 1880, by the amin who was deputed, during the course of the execution of the decree, to measure the land. The Munsif who dealt with the execution case held, in the order dated 10th April, 1880, that the measurement of the length and breadth of the land was accurately entered in the decree, but that the area, 925 square yards, had been

(1) I. L. R., 11 Calc. 6.
(2) I. L. R., 7 All. 336.
(3) *Ante*, p. 111.
(4) I. L. R., 7 All. 411.
(5) I. L. R., 7 All. 276.

erroneously entered instead of 675, and he allowed execution accordingly. But upon appeal the Judge set aside the order on the 24th December, 1880, and pointed out the boundaries of the land which was to be allotted to the decree-holder under the decree. From this order a second appeal was preferred to this Court, and Tyrrell and Duthoit, JJ., held that "the decree, execution whereof has been attempted, is, as it stands, by reason of inherent errors and inconsistencies, unsusceptible of execution, and it was for the decree-holder to have procured from the Court such amendment as would cure these defects, without which amendment the decree cannot be executed." The order of this Court was made on the 13th July, 1881, and its effect was to annul the proceedings of both the Courts. The decree-holder thereupon made an application to the Munsif, under s. 206 of the Civil Procedure Code, for amendment of the decree, and the Munsif, by an order dated the 5th May, 1885, granted the application, and amended the decree so as to allot to the decree-holder an area of only 675 square yards, which, according to the opposite party's own contention, was the extent of land decreed.

For the revision of this order this application has been made by the judgment-debtor under s. 622 of the Civil Procedure Code, and the contention urged before us raises two points for determination. In the first place, it is urged, relying upon the ruling of this Court in *Gaya Prasad* v. *Sikri Prasad* (1) that art. 178, sch. ii of the Limitation Act applies to this case, and that the amendment of the decree was barred by limitation. It is contended, in the second place, that the decree of the 10th July, 1872, being barred by limitation and finally pronounced by this Court to be incapable of execution, the Munsif acted beyond jurisdiction in amending such a decree.

As to the first of these points, all I have to say is that on a former occasion, in the case of *Raghunath Das* v. *Raj Kumar* (2), I respectfully expressed my inability to accept that ruling, holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may, or has to, perform *suo motu*. And

(1) I. L. R., 4 All. 23. (2) I. L. R., 7 All 276.

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I think that this view is supported by the principle upon which the rulings in *Robarts* v. *Harrison* (1), *Vithal Janardan* v. *Rakmi* (2), and *Kylasa Goundan* v. *Ramasami Ayyar* (3) proceeded. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not, in my opinion, render the action of the Court subject to the rule of limitation.

As to the next point, I decline to enter into the question whether the decree of the 10th July, 1872, was barred by limitation when the amendment was made. The question properly appertains to the stage when execution of the decree is prayed for, and, moreover, the record of the case now before us furnishes no material for any adjudication upon the point. Nor do I think that the order of this Court, dated the 13th July, 1881, stood in the way of the amendment. On the contrary, it suggested such amendment, and at any rate cannot be understood to have terminated all future proceedings, whether for securing the amendment or for executing the amended decree. This being my view, the matter stands clear enough. The Munsif had jurisdiction to entertain the application under s. 206 of the Code; he did so entertain it, and in making the amendment his action cannot be regarded as *ultra vires*, beyond the limits of his legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity" within the meaning of s. 622 of the Civil Procedure Code. In laying down this rule I have used the word "jurisdiction" in the sense in which I have explained it. To use the words of Phear, J., in *Lucas* v. *Stephen* (4), it is a right "incident to every Court to correct its formal records in such way, if needed, as will make them represent truly the decision which was intended to be judicially expressed when the decision was delivered. In this way blunders of the pen may be set right." This, indeed, is the scope of the last paragraph of s. 206 of the Civil Procedure Code, and the Munsif in this case only corrected what was obviously a "clerical or arithmetical error" in the decree. In the cases of *Oomanund Roy* v. *Maharajah*

(1) I. L. R., 7 Calc. 333.
(2) I. L. R., 6 Bom. 586.
(3) I. L. R., 4 Mad. 172.
(4) 9 W. R., 301.

Suttish Chunder Roy (1), *Zuhoor Hossein* v. *Syedun* (2), and *Goluck Chunder Mussant* v. *Gunga Narain Mussant* (3), the Calcutta High Court, even under the old Code, allowed such amendments, even though the decree had been made the subject of appeal; and the last of these cases is so far similar to the present case that there, as here, the decree was found incapable of execution because it did not contain any clear direction as to the payment of costs, and the High Court had suggested the amendment. All these cases support my view, and indeed go beyond it. But I must state that I am not prepared, in view of the Privy Council ruling in *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* (4) and the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (5), to accept the proposition that the power of amending a decree continues in the Court making it after it has become the subject of appeal. Markby, J., in the case of *Goluck Chunder Mussant* v. *Ganga Narain Mussant* (3), doubted the proposition, and, speaking for myself, I would accept the rule laid down by Couch, J., in *Bhanu Shankar Gopal Ram* v. *Raghunath Ram Mangal Ram* (6). But the point does not arise in this case as it has been presented to us.

For these reasons I would dismiss this application with costs; but before concluding I wish to point out that this case is distinguishable from our recent ruling in *Tarsi Ram* v. *Man Singh* (7), where the amendment of decree was made after it had been held by a final adjudication to have been barred by limitation, and where the application, with which we had to deal, was in consequence also barred by limitation.

Application dismissed.

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(1) 9 W. R. 471.
(2) 11 W. R. 142.
(3) 20 W. R. 111.
(4) 10 B. L. R. 101.
(5) I. L. R., 4 All. 376.
(6) 2 Bom. H. C. Rep. 106.
(7) *Ante*, p. 492

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July 1.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAMADHAR (DECREE-HOLDER) *v.* RAM DAYAL (JUDGMENT-DEBTOR.) *

Civil Procedure Code, s. 230—Twelve years' old decree—Execution of decree—Meaning of "granted."

A decree passed in April, 1872, was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November, 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code 1882.

Held that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begam* v. *Ghalib Ali* (1). *Tufail Ahmad* v. *Sadho Saran Singh* (2) dissented from. *Jokhu Ram* v. *Ram Din* (3) referred to.

Per MAHMOOD, J., that the previous execution proceedings initiated by the applications of February and December, 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s 230 of the Civil Procedure Code. *Paraga Kuar* v. *Bhagwan Das* (4) referred to.

THE decree of which execution was sought in this case was passed on the 29th April, 1872, and two or three applications for execution were made before the year 1883. Then, on the 2nd February, 1883, an application for execution was made, and notice was issued and served upon the judgment-debtor, who raised objections to the execution on the 10th March, 1883, and a reply to those objections was filed by the decree-holder on the 18th April, 1883. On the 9th July, 1883, the parties asked the Court to allow time for an amicable settlement, but no such settlement having been notified to the Court, the application was struck off on the 19th July, 1883, without any money being realized under the decree. The next application for execution was made on the 10th December, 1883, and notice was issued to the judgment-debtor, but as he could not be found it was affixed to his house under the provisions of the Code; but the decree-holder took no further

* Second Appeal No. 46 of 1886, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 22nd December, 1885, affirming an order of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 15th April, 1885.

(1) I. L. R., 6 All. 189.
(2) Weekly Notes, 1885, p. 193.
(3) *Ante*, p. 419.
(4) *Ante*, p 301.

action, and his application was again struck off on the 19th May, 1884, without any money being realized under the decree.

The next application for execution of the decree was made on the 24th November, 1884, and notice having been issued to the judgment-debtor, the latter, on the 2nd February, 1885, objected to the execution upon the ground, among others, that the decree was barred by the twelve years' rule under s. 230 of the Civil Procedure Code. This objection was allowed by the first Court on the 15th April, 1885, and the order was upheld in appeal by the lower appellate Court on the 22nd December, 1885; and from this order this second appeal was preferred.

It was contended for the appellant that, under the circumstances of this case, the application was not barred, being entitled to three years' grace from the passing of the present Code (17th March, 1882), under the proviso to s. 230, with reference to the Full Bench ruling of this Court in *Musharraf Begam* v. *Ghalib Ali* (1), and that neither the application of 2nd February, 1883, nor that of 10th December, 1883, having been "granted" within the meaning of s. 230 of the Code, the limitation of twelve years, contained in that section, was not applicable to the present application. In support of this last contention *Puraga Kuar* v. *Bhagwan Din* (2) was cited.

Mr. *Simeon*, for the appellant.

Mr. *Carapiet*, for the respondent.

MAHMOOD, J.—The exact effect of the Full Bench ruling was recently discussed and summarized by me in *Jokhu Ram* v. *Ram Din* (3). It is clear from the report of the Full Bench ruling that the application, which was under consideration in that case, was the first made under the present Code after the decree had become twelve years old, and in view of this circumstance the learned Judges constituting the majority of the Full Bench observed :— "In the execution proceedings to which this reference relates, the respondent-decree-holder's application to execute the decree of November, 1870, was not only the first preferred by him under s. 230 of Act XIV of 1882, but the first he had made after the expiration of

(1) I. L. R., 6 All 189. (2) *Ante*, p. 301.
(3) *Ante*, p. 419.

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twelve years from the date of the decree, and as such was, we think, entertainable." That this was not a mere *obiter dictum*, but formed a part of the *ratio decidendi*, is apparent from the judgment itself, and the same conclusion is derivable from what Straight, Offg. C. J., one of the learned Judges of the majority of the Full Bench, has said in *Paraga Kuar* v. *Bhagwan Din* (1) :—"Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is twelve years old, there is a prohibition against its being executed more than once; that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section." There can therefore be no doubt that, according to the opinion of the majority of the Full Bench in the case of *Musharraf Begam* (2), the holder of a decree more than twelve years old was to be allowed *only one* opportunity to execute his decree under that section, and indeed the application with which the Full Bench was dealing was the first application after the decree had become twelve years old, and also the first under the present Code.

Such is not exactly the case here, for both the application of the 2nd February, 1883, and that of the 10th December, 1883, were made under the present Code, but on neither of those occasions was the decree more than twelve years old. The present application, which was made on the 24th November, 1884, is, therefore, the *third* application made under the present Code, but it is the first made after the lapse of twelve years from the date of the decree. It must therefore be entertained within the principle of the ruling of the Full Bench; because the twelve years limitation provided by s. 230 of the Code of 1877 cannot, according to that ruling, be read as included in the proviso to that section. The only authority for the respondent's contention, that this decree is barred, is the ruling of Petheram, C. J., in *Tufail Ahmad* v. *Sadho Saran Singh* (3); but in the case of *Jokhu Ram* v. *Ram Din* (4), I have already stated my reasons for being unable to adopt that ruling.

Then again I agree in what Straight, Offg. C. J., has said in *Paraga Kuar* v. *Bhagwan Din* (1) as to the meaning of the word "granted" as used in s. 230 of the Civil Procedure Code. Here

(1) *Ante*, p. 301. (2) I. L. R., 6 All. 189.
(3) Weekly Notes, 1885, p. 193. (4) *Ante*, p. 419.

the previous execution proceedings under the present Code initiated by the applications of the 2nd February, 1883, and 10th December, 1883, terminated in these applications being struck off, and these results cannot be construed to mean that these applications were "granted" within the meaning of s. 230 of the Civil Procedure Code.

I would decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of first instance for disposal according to law, with reference to the other objections raised by the judgment-debtor. Costs to abide the result.

OLDFIELD, J.—This is an appeal from an order disallowing an application to execute a decree. The decree bears date the 20th April, 1872. Applications to execute the decree have been made and granted under Act X. of 1877 and under the present Code of Civil Procedure, and the present application is dated the 24th November, 1884. The question is, whether it is barred under the provisions of s. 230.

This application is made more than twelve years after the date mentioned in the section, and a previous application for execution has been made and granted under this Code: consequently it would be barred by time, unless it comes under the proviso in the last paragraph of the section, which is as follows :—"Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years of the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

Now this application is within three years of the passing of this Code, and we have to see if the period prescribed for taking proceedings to enforce the decree by the law in force immediately before the passing of this Code has expired. The decree, no doubt, has become time-barred under the provisions of s 230, Act X of 1877; but it has been held by the majority of the Full Bench of this Court that the law referred to in the proviso is not s. 230, Act X of 1877, but the Limitation Act; and with reference alone to the Limitation Act the decree cannot be held to be time-barred.

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I dissented from the majority of the Full Bench in the ruling referred to, but I am bound to decide this case in accordance with it. A decision of a Division Bench of this Court has been cited to the effect that "that the proviso in s. 230 applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230"—[*Tujait Ahmad* v. *Sadho Saran Singh* (1)]

According to this ruling, the decree we are dealing with would not be saved by the proviso, which would not apply to it.

But I am unable to concur in the interpretation of the proviso taken by the learned Judges in that case.

I would set aside the orders and remand the case for execution. Appellant will have costs in all Courts.

Case remanded.

1886 *July* 2.

Before Mr. Justice Straight, Offg Chief Justice, and Mr. Justice Mahmood.

RAM AUTAR (PLAINTIFF) *v* DHANAURI AND OTHERS (DEFENDANTS).*

Mortgage—First and second mortgages—Registered and unregistered documents—Act III of 1877 (*Registration Act*), *s.* 50—*Fraudulent transfer—Act IV. of* 1882 (*Transfer of Property Act*), *s* 53.

Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank* v. *Barry* (2), where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV. of 1882) is applicable to such a transaction In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a

* Second Appeal No. 1629 of 1885, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 28th July, 1885, confirming a decree of Pandit Rajnath, Munsif of Benares, dated the 19th February, 1885.

(1) Weekly Notes, 1885, p. 193. (2) L. R., 7 H. L. 135.

t ansaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforcible *Rahmat-ulla* v. *Sariut ulla* (1) referred to.

In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

Held that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877).

THE plaintiff in this case claimed possession of certain land, by virtue of a registered instrument of mortgage dated the 20th June, 1883. Part of the land was in the possession of one of the defendants under an unregistered instrument of mortgage dated the 17th January, 1881. Both the instruments of mortgage were instruments the registration of which was not compulsory. It was found as a fact that at the time of the execution and registration of his mortgage-deed, the plaintiff was aware that the first mortgagee, defendant, was in possession under his mortgage. Both the lower Courts held that, under these circumstances, the fact that the plaintiff's deed was registered, did not entitle him to dispossess the first mortgagee.

In second appeal the plaintiff contended that his registered deed should have priority over the defendant's unregistered deed.

Mr. *Niblett*, for the appellant.

Lala *Juala Prasad*, for the respondents.

STRAIGHT, J.—It has been found as a fact by both the lower Courts, and the appellant's pleader admits it to have been so found, that the plaintiff took his mortgage of the 20th June, 1883, with notice of the defendant's possessory mortgage of the 17th January, 1881. Both these instruments were for sums of money below Rs. 100, and both were optionally registrable, that of the 20th June, 1883, being, in fact, registered, and that of the 17th January, 1881, being unregistered.

The question then arises whether the plaintiff, having taken his document of the later date with knowledge of the prior title

(1) 1 B. L. R., F. B., 58.

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of the defendant and of his possession, in virtue of it, of the land to which the suit relates, is entitled to enforce the provisions of s. 50 of the Registration Act, 1877? In support of the contention that he is, his pleader referred to *Nallappa Goundon* v. *Ibram Sahib* (1), *Madar Saheb* v. *Subbarayalu Nayudu* (2), and *Kota Muthanna Chetti* v. *Ali Beg Sahib* (3). On the other side our attention was called to *Fuzl-ud-deen Khan* v. *Fakir Mahomed Khan* (4), *Dinonath Ghose* v. *Auluck Moni Dubee* (5), *Narain Chunder Chuckerbutty* v. *Dataram Roy* (6), and *Nani Bibee* v. *Hafiz-ul-lah* (7), and *Bhalu Roy* v. *Jokhu Roy* (8). Putting aside any question of equitable estoppel, such as is so forcibly described by Lord Cairns in the *Agra Bank* v. *Barry* (9), it seems to me that where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith (see Story's Equity by Grigsby, s. 397, and 2 White and Tudor, pp. 45, 46), and that the principle enunciated in s. 53 of the Transfer of Property Act is applicable to such a transaction. In other words, in such a condition of circumstances, the condition of things is that *quâ* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law, to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this respect of the matter such document would not be a "document" in the sense of s. 50 of the Registration Act, which term, as therein used, I understand to mean a document legally enforcible, and I am confirmed in this opinion by the remarks of Sir Barnes Peacock, C. J., in *Rahmat-ulla* v. *Sariat-ulla* (10). This being the view I take of the question raised by the second

(1) I. L. R., 5 Mad. 73.
(2) I. L. R., 6 Mad. 88.
(3) I. L. R., 6 Mad. 174.
(4) I. L. R., 5 Calc. 336.
(5) I. L. R., 7 Calc. 753.
(6) I. L. R., 8 Calc. 597.
(7) I. L. R., 10 Calc. 1073.
(8) I. L. R., 11 Calc. 667.
(9) L. R., 7 H. L. 135.
(10) 1 B. L. R., F. B. 82.

plea in appeal, the Courts below were, in my opinion, right in giving effect to the defendant's deed, and I dismiss this appeal with costs.

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MAHMOOD, J.—I concur.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1886 *July* 8.

BEHARI DAS (PLAINTIFF) *v.* KALIAN DAS (DEFENDANT).

Arbitration—Making award after the time allowed by Court—Civil Procedure Code, s. 521.

Under s 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

He'd that the award was not "made within the period fixed by the Court" within the meaning of s 521 of the Civil Procedure Code.

THE facts of this case are stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Nand Lal*, for the respondent.

TYRRELL, J.—This case is one in which a reference to arbitration was made when the suit was in the Court of first instance.

The question at issue was referred to three arbitrators, namely, Nand Kishore, Jit Mal and Beni Ram, and the order of the Court was, that the award made by these arbitrators should be filed, that is to say, made and delivered, on or before the 19th September, 1885. As a matter of fact the award of the three arbitrators was not filed on that date, but was signed by two of them on that date, and by Beni Ram, the third arbitrator, on the 20th September. Both parties objected to the propriety and correctness of the arbitrators' award, but their objections were overruled, and a decree based on the award was passed.

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* First Appeal No 97 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 10th May, 1886.

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On appeal by the defendant the lower appellate Court set aside this decree, holding the award to be invalid, and remitted the case to the first Court for trial on its merits. This order of the lower appellate Court is the subject of the present appeal. The learned pleader for the appellant, while admitting that the award was not signed, filed and delivered within the period allowed by the Court, contends notwithstanding that the award was "made" on the 19th September, in the sense of the last paragraph of s. 521, and therefore was valid. He bases his argument mainly on the terms of s. 515 of the Code, which provides that when an award has been made, the parties shall sign it, the argument being that an award, though unsigned, may still, in the sense of that section, be considered to have been "made." He also contends in an oral plea that the award of two out of three arbitrators having been made and signed on the 19th September, the award was a good one, inasmuch as it had been agreed that the opinion of the majority should carry the decision. I would not allow these contentions. Looking to s. 508 of the Code, I find that it is the duty of the Court to fix the time for "delivery" of the award, and under s. 514, if the award cannot be completed within the time so fixed, the Court may enlarge the time *for its "delivery."* These are the only provisions referring to the period to be fixed by the Court; and as they both contemplate the *delivery* of the award, which necessarily pre-supposes the *making* and signing of such award, it follows that, under s. 521, the rule that no award shall be valid unless "made" *within the period fixed by the Court*, is equivalent to a rule that the award must be "delivered" within that period. In the case before us it is to be noted that the order to file or deliver the award before the 19th September was as precise as it could be. The award, therefore, in the case which was signed by two arbitrators only within the time fixed for its delivery in a completed state, and was not filed till the day after the expiry of the limit fixed by the Court, was not "made within the period fixed by the Court." As to the oral plea, it is sufficient to say that the Court's order was, that the award of the three arbitrators, and not the award of the majority, should be filed on or before the 19th September; and even the award of the majority was not delivered or filed on that day. I am, therefore,

of opinion that the pleas in appeal are not sound, and that this appeal must be dismissed with costs.

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OLDFIELD, J.—I concur.

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1886 *July* 8.

NAND RAM (PLAINTIFF) *v* SITA RAM AND ANOTHER (DEFENDANTS).*

Execution of decree—Decree enforcing the right of pre-emption—Non-payment of purchase-money decreed by appellate Court—Restitution of purchase-money paid under lower Court's decree—Civil Procedure Code, s 583—*Application for restitution—Revival of application—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No* 179 (4).

A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July, 1880, the plaintiff paid this amount into court, and it was drawn out by the defendant in August, 1881 Meanwhile, in July, 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May, 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted and the defendant ordered to refund, and this order was confirmed on appeal in January, 1885, and by the High Court in second appeal in May, 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December, 1884, removed the application temporarily from the "pending" list. In February, 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation.

Held that this application was only a revival of the application of May, 1883, which was within time.

Held also that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July, 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower appellate Court; that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits;" that he did this in May, 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act; and that his present application to the same effect being within three years from that application was within time.

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* Second Appeal No. 52 of 1886, from an order of M. S. Howell, Esq., District Judge of Aligarh, dated the 12th April, 1886, reversing an order of Babu Abinash Chandar Banarji, Subordinate Judge of Aligarh, dated the 6th February, 1886.

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NAND RAM
v.
SITA RAM.

THE facts of this case were as follows:—

The plaintiff in a suit to enforce the right of pre-emption obtained a decree in the Court of the Subordinate Judge of Aligarh for possession of the property claimed, conditionally on the payment of Rs. 1,098-11-0. The defendants-vendees appealed to the District Judge, by whom the purchase-money was increased to Rs. 1,139-15-6. On the 6th July, 1880, the plaintiff paid this sum into court, and it was taken out by the defendants on the 19th August, 1881. The defendants having preferred a second appeal to the High Court, that Court, on the 27th July, 1881, increased the purchase-money to Rs. 2,400, directing that this sum should be paid into court within six weeks from the date of its decree, that is, by the 7th September, 1881, or the plaintiff's suit should stand dismissed. The plaintiff did not pay the money, and consequently his suit stood dismissed. On the 25th May, 1883, he applied to the Subordinate Judge for the restitution of the money he had paid into court under the decree of the District Judge, asking for the arrest of the defendants. This application was allowed on the 4th July, 1883; but the defendants having preferred an appeal to the District Judge against the order granting it, the Subordinate Judge, on the 4th December, 1884, struck off the application pending the decision of the appeal. On the 15th January, 1885, the District Judge affirmed the order of the 4th July, 1883, and dismissed the appeal. On the 19th February, 1885, the plaintiff applied again to the Subordinate Judge for the restitution of the money, asking for the attachment and sale of property belonging to the defendants. On the 25th May, 1885, the defendants having in the meantime appealed from the District Judge's order of the 15th January, 1885, that order was affirmed by the High Court.

The defendants contended that the application of the 19th February, 1885, was barred by limitation. The Subordinate Judge disallowed this contention, holding that limitation would run from the order of the High Court dated the 25th May, 1885, and that the application was only a revival of the one made on the 25th May, 1883.

On appeal by the defendant the District Judge held that the application was an independent one, and not a revival of the one

of the 25th May, 1883; that it was one for refund of money paid under the District Judge's decree and therefore governed by No. 178, sch. ii of the Limitation Act; that the right to apply accrued on the 7th September, 1881; and the application was therefore barred by limitation.

The defendant appealed to the High Court, contending, *inter alia*, that the application was within time, being a revival of the one of the 25th May, 1883.

Pandit *Nand Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

OLDFIELD and TYRRELL, JJ.—The appellant was a successful plaintiff in a pre-emption suit, the first Court having decreed the property to him on condition of his paying for it the price of Rs. 1,098-11-0. The first appellate Court raised this sum to Rs. 1,139-15-6; and on the 6th July, 1880, the plaintiff paid this sum into court. The defeated party drew it out on the 19th August, 1881. But meanwhile the High Court in second appeal decreed the enhanced sum of Rs. 2,400 to be the true price payable by the pre-emptor, who, finding it more than he cared to give, let the time limited for payment of the excess difference elapse without paying it. On the 25th May, 1883, the plaintiff applied to the Subordinate Judge in the department of execution of the decree for the refund of his deposit, which had been drawn and retained by the other side. His application was granted, and the defendant was ordered to refund on the 4th July, 1883. But the latter carried the case in appeal to the District Judge, who, on the 15th January, 1885, confirmed the Subordinate Judge's orders. Mean time the latter had suspended execution of the order, pending the result of the appeal; and the order of the 4th December, 1884, removed the application temporarily from the "pending" list. On the 19th February, 1885, the plaintiff applied to the Subordinate Judge to enforce the refund; and an appeal by the defendant in the last resort to the High Court was dismissed on the 25th May, 1885, the orders of the local Courts being confirmed. But the Aligarh District Judge has now pronounced the plaintiff's remedy to be barred by limitation. Hence this appeal. It is argued that the application of the 19th February, 1885, is only a revival of

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NAND RAM v. SITA RAM.

the application of the 25th May, 1883, which was within time; and the contention appears to be sound and sustainable. But apart from this consideration, it is clear that the application for the refund is not time-barred. The plaintiff applicant is, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the appellate Court made on the 27th July, 1881. It was a necessary incident of that decree, which declared the plaintiff's deposit of Rs. 1,139-15-6 to be insufficient to purchase the property under pre-emption, that he was entitled in consequence to restitution of this sum, which he had paid as the sufficient price under the decree of the lower appellate Court, and the plaintiff was competent to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits"—s. 583 *supra*. This he did in May, 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act. And his present application to the same effect made on the 19th February, 1885, being within three years of that application, is within time. The order of the Subordinate Judge therefore, directing execution to be made in the plaintiff's favour, must be restored, that of the District Judge being set aside, and this appeal is allowed with all costs.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1886 *July 9.*

CHUHA MAL (PLAINTIFF) *v* HARI RAM (DEFENDANT).*

Arbitration—Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Civil Procedure Code, ss. 508, 514, 521, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.

The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.

An award which is invalid under s. 521 of the Civil Procedure Code, because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award

* First Appeal No 78 of 1886, from an order of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 24th March, 1886.

is not a decree in accordance with an award from which no appeal lies, with reference to the ruling of the Full Bench in *Lachman Das* v. *Brypal* (1).

Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court, *held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.

THE plaintiff in this case claimed possession of certain land. In the course of the suit in the Court of first instance the parties agreed to refer the case to the arbitration of one Amba Prasad. The Court of first instance (Munsif of Farukhabad) made an order referring the case to the arbitrator, and fixing the 10th July, 1885, for the delivery of the award. On the application of the arbitrator the time for the delivery of the award was extended to the 9th August, 1885, and then to the 24th September, 1885. The arbitrator delivered his award (which was in the plaintiff's favour, and awarded him possession of the land claimed and costs of the suit) on the 26th September, 1885, or two days beyond the time allowed. The defendant took certain objections to the award, but did not take the objection that the award was invalid as it had not been made within the time allowed by the Court. The Court of first instance disallowed the objections, and passed a decree in accordance with the award. The defendant appealed on the ground that the award was invalid, as it had not been delivered within the time allowed ; and the lower appellate Court (District Judge of Farukhabad) allowed the appeal on this ground, and, setting aside the award, remanded the case to the Court of first instance for trial on the merits.

The plaintiff appealed from the order of remand, the 1st and 2nd grounds of appeal being (i) that the decree of the Court of first instance was not appealable, having been passed in accordance with the award ; (ii) that the objection with reference to which the lower appellate Court had reversed that decree had not been taken in the Court of first instance, and was therefore not entertainable in the appellate Court.

Babu *Ram Das Chakarbati*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

(1) I. L. R., 6 All. 174.

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v.
HARI RAM.

OLDFIELD, J.—This is an appeal from the decree of the Judge setting aside the decree of the Court of first instance made on an award of arbitrators.

The matter in dispute had been referred to arbitration under s 506 and following sections, Civil Procedure Code, and a time fixed for submission of the award, which was extended: the award, however, was not submitted till two days after the expiry of the time allowed.

Objections were taken to the award by the defendant, which did not include any as to its invalidity by reason of its being submitted after the time allowed. The objections were disallowed, and the Court made a decree in accordance with the award.

The defendant appealed to the Judge on the ground that the award was invalid, and the Judge, allowing the plea, has set aside the decree. The plaintiff now appeals to this Court, and contends that under s. 522, Civil Procedure Code, no appeal lay to the Judge, and that the defendant is estopped from raising the objection, as he failed to raise it in the Court of first instance. S. 521 enacts that no award shall be valid unless made within the period allowed by the Court. The award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid, that is, there was no award on which the Court could make a decree. I think the law (ss. 508 and 514) requires that there shall be an express order of the Court fixing the time for delivery of the award, or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award, cannot be taken as affording a presumption that an extension of time was given; nor do I think that the defendant is estopped from raising this particular ground of objection because he did not raise it in the first Court; it is not shown that he was then aware of the defect, or had done anything to imply consent to extension of the time.

As the award was invalid, the decree of the first Court is not a decree in accordance with an award from which no appeal lies, with reference to the Full Bench ruling of this Court (1). I would dismiss the appeal with costs.

(1) I. L. R., 6 All. 174.

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BRODHURST, J.—I entirely concur in dismissing the appeal with costs, and in the reasons given by my brother Oldfield for so doing.

Appeal dismissed.

CIVIL REVISIONAL

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July 22.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

MAKTAB BEG AND OTHERS (DEFENDANTS) *v.* HASAN ALI (PLAINTIFF).*

Civil Procedure Code, s. 561—Objections by respondent—Withdrawal of appeal.

Where an appeal was dismissed upon the application of the appellant himself made before the hearing,—*held* that the respondents, who had filed objections to the decree of the Court of first instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Coomar Puresh Narain Roy* v *Watson and Co.* (1) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (2) referred to.

The facts of this case are stated in the judgment of Oldfield, J.

Mr. *Niblett*, for the applicants (defendants).

Munshi *Kashi Prasad*, for the plaintiff.

OLDFIELD, J.—This is an application, under s. 622 of the Civil Procedure Code, to revise an order of the lower appellate Court passed in an appeal from a decree of the Munsif of Muhammadabad. The plaintiff brought a suit against the applicants before us for damages for breach of contract. The Munsif decreed a portion of the claim and dismissed the remainder. The plaintiff preferred an appeal, and the applicants before us, who were respondents, filed objections under s. 561 of the Code. Before the hearing began the plaintiff-appellant applied to withdraw his appeal, and it was dismissed, and the applicants' objections were at the same time dismissed, without the lower appellate Court going into them. It is this order of the Judge we are asked to revise. I am of opinion that the applicants had no claim, under the circumstances, to have their objections heard when the appeal itself was not heard. The terms of s. 561 are, that a respondent may, upon the hearing, support the decree on any grounds decided against him in the Court

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* Application No 217 of 1885 for revision under s. 622 of the Civil Procedure Code of an order of J. M. C. Steinbelt, Esq, District Judge of Azamgarh, dated the 21st July, 1885.

(1) 23 W. R. 229. (2) I L R., 9 Bom. 28.

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below, or take any objection to the decree which he could have taken by way of appeal, but he can only do so upon the hearing that is, if the appeal comes to be heard. This view is supported by *Coomar Puresh Narain Roy* v. *Watson & Co.* (1) and *Dhondi Jagannath* v. *The Collector of Salt Revenue* (2), the latter decision proceeding upon the same *ratio decidendi.* This application must therefore be dismissed.

MAHMOOD, J.—I am entirely of the same opinion, and would add that the principle of this decision is in accord with that which the Procedure Code and the law recognizes as applicable in cases where the action of one party to a suit is dependent on that of the other. It proceeds upon the hypothesis that had the applicants really desired to object to the lower Court's decision, they would themselves have preferred a separate appeal. The right of a respondent to have his objections heard as if he had appealed must, I think, depend on the appellant's appeal, and should only be allowed when the appellant proceeds with his appeal to a hearing. In my experience these objections are generally filed long after the time allowed for appealing has expired, and the hearing of them is subject to the condition of the appellant proceeding with his appeal to a hearing. The right to have these objections heard vanishes when the condition upon which they depend vanishes, and this upon general principles. In this case the appeal itself was never heard.

Application dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

WARIS ALI (DEFENDANT) *v.* MUHAMMAD ISMAIL AND OTHERS (PLAINTIFFS). *

"Rent-free grant"—"Rent"—Services—Jurisdiction—Civil and Revenue Courts—Act XII. of 1881 (*N.-W. P. Rent Act*), *ss.* 3 (2), 30, 95 (*c*)—*Act XIX. of* 1873 (*N.-W. P. Land Revenue Act*), *ss.* 3 (4), 79-89, 241 (*h*).

A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on

* Second Appeal No. 1749 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 20th August, 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 5th January, 1885.

(1) 23 W. R. 229. (2) I. L. R., 9 Bom. 28.

condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the N.-W. P. Rent Act (XII. of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court.

Held by OLDFIELD, J., (MAHMOOD, J., dissenting) that the suit could not be held to be one to resume a rent-free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

Held by MAHMOOD, J, that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that under these circumstances the suit was not cognizable by the Civil Court.

Per OLDFIELD, J.—The definition of the term "rent" in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land. Further, there was no such grant as is contemplated by s 30 of the Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX. of 1793, and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act. *Matty Lall Sen Gywal* v. *Deshkar Roy* (1) and *Puran Mal* v. *Padma* (2) referred to.

Per MAHMOOD, J.—The services connected with the grant in this case did not constitute "rent" within the meaning either of the N.-W. P. Rent Act, or of the N.-W. P. Land Revenue Act (XIX. of 1873), and the word "render" in s. 3 of the former Act does not include or imply the rendering of services or labour. The word "rent" is probably used as the equivalent of the Hindustani words *lagán* or *poth*, representing the compensation receivable by the landlord for letting the land to a cultivator, and s 3 of the Rent Act, where it uses the expressions "paid, delivered, or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisement or valuation of the produce The grant in the present case was a rent-free grant of the nature of *chákrán* or *chákri*, *i.e.*, service-tenure, to which s. 41 of Regulation VIII. of 1793 related. The incidents of the tenure would be governed by s. 30 of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 10 of Regulation XIX. of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (*c*) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241 (*h*) of the latter

(1) 9 W. R. 1. (2) I. L. R., 2 All. 732.

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Act. *Puran Mal* v. *Padma* (1), *Tika Ram* v. *Khuda Yar Khan* (2), and *Forbes* v. *Meer Mahomed Tuquee* (3) referred to

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

OLDFIELD, J.—This suit has been brought by the plaintiff to eject the appellant-defendant, Waris Ali, from one bigha of land in mauza Burhausi.

The plaintiff's case is that this is rent-paying land which had been granted to Nasiba by the plaintiff's father many years ago, free from payment of any rent, on condition that certain services as a mimic should be performed; that these services continued to be performed till lately, when Nasiba discontinued them, and has sold the land to the appellant.

The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the Rent Act: but the application was disallowed on the ground that the Revenue Court had no jurisdiction, there being no rent-free grant as contemplated in the Act.

The defence was, that the land had been bestowed unconditionally on Nasiba, who enjoyed it as the proprietor.

The Court of first instance found that the land had, up to 1264 fasli, been recorded as paying cash rent, and in 1274 fasli it was recorded that the said rent was remitted in lieu of services rendered, and it found that the land had been held by Nasiba on these conditions; that there was no rent-free grant in the sense of s. 30 of the Rent Act, and no bar to entertaining this suit for ejectment, since the conditions of service had ceased, and Nasiba had wrongfully alienated the land.

Waris Ali appealed to the Judge, who has substantially come to the same conclusion as the first Court.

Waris Ali, defendant, has appealed on three grounds:—

(i) That this suit is not cognizable by the Civil Court; (ii) that the proceedings in the Revenue Court operate to bar the claim, as

(1) I. L. R., 2 All. 732. (2) I. L. R., 7 All. 191.
(3) 13 Moo. I. A. 438.

the matter was finally decided there, and the question now raised is *res judicata*; (iii) that the finding as to the nature of the tenure is not supported by the evidence.

The last plea cannot be entertained, so far that we cannot in second appeal interfere with the finding that the land was granted to, and held by, Nasiba in lieu of services to be performed, which were rendered instead of a cash rent payment.

Whether or not this suit is cognizable by the Civil Court, depends on whether it can be held to be a suit to resume a rent-free grant in the sense of s. 30 of Act XII. of 1881, or has for its object to eject a tenant, and so deals with matters in which the Revenue Court has exclusive jurisdiction under ss. 93 and 95 of the Rent Act.

Now, it is found that this land was land for which rent used to be paid in cash, and it was given to Nasiba on the condition that he rendered to the zamindar certain services in lieu of paying a cash rent for the land. Now rent in the Rent Act is defined to be "whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land," and it seems to me clear that Nasiba was a tenant who rendered certain services on account of his use of the land. It has been pressed on us that the term "rent" as used in the Rent Act cannot mean services rendered to the landlord for the use of land, but is confined to that which is paid or delivered or rendered in cash or kind; because the provisions of the Act are only operative in respect of remedies in regard to rent of that character, and inoperative in respect of rent in the shape of services rendered. But the argument is not conclusive; for whether or not all the provisions of the Act can be brought into force only in respect of rent taken in one shape is no ground for assuming that the term "rent" may not include something taken in another shape. Now the definition of "rent" in s. 3 seems to me expressly intended to include services or labour rendered for the use of land, and in point of fact the word "rent" has always been so understood.

Blackstone defines it:—"The word rent, or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal hereditament. It is defined to be a certain profit issuing yearly out of lands

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and tenements corporeal. It must be a profit, but there is no occasion for it to be, as it usually is, a sum of money, for spurs, capons, horses, corn, or other matters, may be rendered by way of rent. It may also consist in services or manual operations, as to plough so many acres of ground, to attend the king or the lord to the wars, or the like, which services in the eye of the law are profits."

I have no doubt the Legislature had this meaning of rent in view, and it seems clear from s. 8 (c) of the Act that "rent" was intended to include services rendered for the use or occupation of land.

S. 8 (c) contemplates the case of a tenant holding land in lieu of wages, that is, holding it for services rendered, remunerated by the profits of the land instead of wages. But a tenancy implies the relation of landlord and tenant between the holder of the land and the receiver of the services, and as landlord is defined in the Act to be the "person to whom a tenant is liable to pay rent," it follows that in such a case the services rendered constitute rent under the Act.

I therefore hold that the tenure in this case is that of a tenant paying rent to the landlord.

But a further question would arise whether there has been such a grant as is contemplated by s. 30 of the Rent Act. That section refers to grants for holding land exempt from the payment of rent alluded to in s. 10, Regulation XIX. of 1793.

Now it appears to me very clear that the grant in this case is not one of those to which the Regulation refers. The Regulation has reference to grants of land free from payment of revenue; but, assuming that it refers to grants free from payment of rent also, it contemplated grants of land not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. This was pointed out by Norman, J., in a very important case decided by the Calcutta Court, where the whole question of these grants was exhaustively discussed—*Mutty Lall Sen Gywal* v. *Deshkar Roy* (1)

Norman, J., remarked that what was contemplated was a grant of land to hold in absolute proprietary right, not only free from

(1) 9 W. R. 1.

payment of any rent in money, but without any dependence on, or duty to, the zamindar, and that when the grantor holds subject to the performance of any duty or conditions, the Regulations appear to treat him as a lease-holder ; and he pointed out that s 7, Regulation VIII. of 1793, shows that persons holding land subject to performance of conditions stipulated for, are to be considered as lease-holders only. The same view was taken by this Court in *Puran Mal* v. *Padma* (1). S. 30 of the Rent Act deals with such grants as are contemplated in s. 10, Regulation XIX. of 1793, and we must see what they were, and I think the view expressed by Norman, J., and by Spankie, J., in the case of *Puran Mal* (1) is correct, and that a tenure, such as the one we are now dealing with, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act.

There was therefore no rent-free grant at all in the sense contemplated by s. 30 of the Rent Act, and this cannot be held to be a suit to resume a rent-free grant, in which matters the Revenue Court has exclusive jurisdiction. It is, in fact, a suit to eject the appellant as a trespasser, between whom and the plaintiff there is no relation whatever of landlord and tenant, and it does not concern itself with any dispute or matter such as are referred to in s. 93 or s. 95 of the Rent Act as exclusively cognizable by the Revenue Court. From what has already been stated, it is scarcely necessary to add that the plea of *res judicata*, with reference to anything done in the Revenue Court, has no force whatever. I would dismiss the appeal with costs.

MAHMOOD, J.—The only question of significance raised in this appeal relates to the jurisdiction of the Civil Court in a suit of this nature, and on that question depends also the determination of the plea of *res judicata* which has been raised in this case. In deciding the question some difficulty, no doubt, is created by two rulings of this Court, one being *Puran Mal* v. *Padma* (1) and the other a ruling of my own in *Tika Ram* v. *Khuda Yar Khan* (2). In the former of these cases the plaintiffs, as zamindars, sued for certain land in their village, on the allegation that it had been

(1) I. L. R., 2 All. 732. (2) I. L. R., 7 All. 191.

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assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of *balahar* or village watchman, and that the defendant, having ceased to perform those duties, was holding as a trespasser, and as such was liable to eviction. The defendant's plea was that he and his predecessors, having held the land rent-free for two hundred years, had acquired a proprietary title which could not be defeated by the plaintiff. Spankie, J., who delivered the judgment of the Court in that case, held that such assignment of land was not a "grant" within the meaning of Regulation XIX of 1793; that the operation of ss. 30 and 95 (*c*) of the Rent Act (XVIII. of 1873) and ss. 79 and 241 (*h*) of the Revenue Act (XIX. of 1873), so far as they oust the jurisdiction of the Civil Court, was limited to grants contemplated by that Regulation; and that therefore the dispute raised in that suit was cognizable by the Civil Court. In the course of his judgment the learned Judge observed :—"What the plaintiff desires in this case is full possession of a plot of land which, he says, has hitherto been held without payment of rent by defendant, the village '*balahar*' or watchman. He was allowed to occupy the land for his support, and, in point of fact, whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman." In the other case, the facts before me were not altogether dissimilar to the case just referred to, but it had been found that "the defendant and their ancestors have been in possession of this land for more than fifty or sixty years," and that they "are in possession as *muáfi*-holders, and have never paid any rent." The duties for which the land was originally assigned were those of *kherapati* of the village, such duties being the performance of certain annual religious ceremonies, and the ground upon which the eviction of the defendant was claimed was that the defendant, having wrongly planted a grove on the land, had been dismissed by the plaintiff zamindar from the office of *kherapati*. Upon this state of things I held that the grant, whatever its origin may have been, was admittedly a rent-free grant, and being proved to be older than sixty years, during which time the defendant or his ancestors never paid any rent, as was found by the Courts, the

nature of the dispute there was beyond the jurisdiction of the Civil Court, because it could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the Rent Act (XII. of 1881), and therefore the provisions of cl. (*c*) of s. 95 of that Act, and for similar reasons of cl. (*h*) of s. 241 of the Land Revenue Act, were applicable. Whether there is any distinction in principle, for the purposes of this question of jurisdiction, between the temporal functions of a *balahar* or village watchman and those of a *kherapati* or the village priest, is open to doubt, though I may observe that in the case of *Raghubardyal* v. *Gyadin* (cited at page 16 of Mr. Teyen's edition of the Rent Act), the Sudder Board of Revenue held that religious grants which involve more or less the performance of some religious rite or ceremony, do not fall under the head of '*khidmati*' grants, and the provisions of s. 30 of the Rent Act are therefore applicable to them (Board's File No. 802 of 1881). I, however, think that the learned Judge of the lower appellate Court was right in thinking that the two rulings of this Court already referred to are not fully reconcilable in their *ratio decidendi*, and I may add, as supporting the view of Spankie, J., that the Sudder Board of Revenue in *Ganga Dhar* v. *Baldeo* (1) held that an assignment of land, on condition that certain services are performed by the assignee (*haqqul-khidmat* grants), is not a rent-free grant within the meaning of s. 30 of the Rent Act, since the service is equivalent to rent.

It might perhaps have been possible, with reference to the rulings above mentioned, to distinguish my ruling in *Tika Ram* v. *Khuda Yar Khan* (2) by saying that the duties of a *kherapati* were of a spiritual nature, and could not therefore be regarded as rent within the meaning of the definition contained in cl. (2) of s. 3 of the Rent Act, or cl (4) of s. 3 of the Land Revenue Act. But this was not the *ratio decidendi* upon which my ruling in that case proceeded, and, moreover, here the services for which the grant is alleged to have been made were those of a mimic or drollery, which it would not be easy to classify either under the head of spiritual or substantial temporal services. At any rate, the exigencies of the present case require me to decide whether such services are "*rent*"

(1) 1 N.-W. P. Legal Remembrancer, Revenue and Rent Series, 118.

(2) I. L. R., 7 All. 191.

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within the meaning of cl. (2), s. 3 of the Rent Act, or cl. (4), s. 3 of the Land Revenue Act, the words employed in both the enactments in defining rent being identical. The words are:—"'*Rent*' means whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land." It is contended that the word "*rendered*" is used in this definition as applicable only to services, and that cl. (*c*) of the proviso to s. 8 of the Act, which lays down that no tenant shall acquire a right of occupancy "in land held by him in lieu of wages," supports this interpretation.

Having given the question the best consideration I can, I find myself forced to arrive at the conclusion that the services attributed to the grant in this case did not constitute "*rent*" within the statutory definition. The whole argument in favour of the contention really rests upon the exact interpretation of the word "render"—a word which, in the English language, possesses many meanings, and which in one sense would undoubtedly include or imply the rendering of service or labour. But the primary meaning of the word is "to return, to pay back, to restore," and among other meanings the word simply means "to give on demand, to give, to assign, to surrender." The last and most approved edition of *Webster's Dictionary* is my authority for these meanings, and I am inclined to adopt this interpretation in preference to limiting the word to services. I shall presently show that this is the only manner in which the definition of "rent" in the interpretation clause can be rendered intelligible and consistent with the use of the word throughout the remaining provisions of these enactments. It is contended, with reference to cl. (*c*) of the proviso to s. 8 of the Rent Act, that a tenant holding land "in lieu of wages" renders service as "rent" within the meaning of the definition. But I do not think such a conclusion necessarily follows. The word "tenant" is not exhaustively defined in either of these enactments, and if the word is understood in its general sense, it does not, on the one hand, necessarily follow that every tenant pays rent, or delivers anything in lieu thereof; nor, on the other hand, does it necessarily follow that every service performed by such tenant for the zamindars constitute rent. Thus, a tenant who is in possession of land, "in lieu of wages,"

need not be liable to payment of any "rent,' within the meaning of the Act.

I shall now show this is the only consistent interpretation required by that rule of construing statutes, which says that when words are specially defined in an enactment, they must throughout be interpreted in that same sense. The scope of the Rent Act includes among its most important provisions, as the preamble shows, rules "relating to the recovery of rent," and indeed this might perhaps be said to be the whole province of the enactment. Now, if I can show from the enactment itself that there is not a single provision in it which can possibly be construed as laying down a rule for the "recovery of rent," if services such as those in this case are understood as rent, I think I shall have shown that "rendered" must be understood as I have interpreted it, and that rent must not be understood to include such services.

The first provision, then, to which I would refer is s. 21 of the Rent Act, which confers a general right upon all tenants to claim a lease from the landlord, defining, *inter alia*, matters as to the amount of "annual rent payable," "the instalments in which, and the dates on which, such rent is to be paid." These are the words of clauses (*b*) and (*c*), and it is clear that neither of them can possibly apply to such services as in this case. Then comes cl. (*e*), which, in enumerating the contents of the lease, says—"If the rent is payable in kind, or is calculated on a valuation of the produce, the proportion of produce to be delivered, the mode of valuation, and the time, manner, and place of delivery." In my opinion, it is impossible to hold that mimicry can be regarded either as rent "payable in kind," or covered by any other portion of this clause. And if this is so, then we have the necessary inconsistency in the Act that whilst the section confers the right upon "*every tenant*," a tenant who holds land in lieu of the performance of mimicry cannot claim the benefit of the law. Then comes s. 34, which lays down that "when an arrear of rent remains due from any tenant, he shall be liable to pay interest on such arrear at one per cent. *per mensem*; and if the arrear remains due on the 30th day of June, to be ejected from the land in respect of which the arrear is due." It is obvious that in this clause "rent" cannot be understood to include

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services of mimicry. I could go through the whole Act and show that in no part of it can such services be possibly understood to mean "rent." But I will go at once to the remedial part of the statute and refer to s. 56, which, after stating that the produce of all land in the occupation of a cultivator is to be deemed as hypothecated for rent, goes on to say that "when an arrear of rent is due from any cultivator, the person entitled to receive rent immediately from him may, instead of suing for the arrear as hereinafter provided, recover the same by distress and sale of the produce of the land in respect of which the arrear is due, under the rules contained in this chapter." How is it possible to hold that this provision applies to rent of the nature which is said to constitute rent in this case? And if distress is not the mode of recovering such rent, is there a single provision of the Act which provides a remedy for the landlord to recover such rent? There is, indeed, another provision to be found in cl. (*a*), s. 93, which relates to "suits for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or on account of any rights of pasturage, forest rights, fisheries or the like." This clause is equally inapplicable to such services as mimicry, and I am wholly unaware of any provision in the Act which would enable the landlord to enforce the recovery of such rent. The matter therefore stands thus: that a statute which in the preamble states its object to be to provide rules for the "recovery of *rent*," defines rent in such a broad manner as to include the performance of mimicry, and then defeats its own whole object by providing absolutely no rule for recovery of such rent. Sooner than accept this necessary consequence, I am prepared to say that the word "*render*," as it occurs in the definition of "rent," must not be so understood as to include such services. Similar reasons, *mutatis mutandis*, satisfy me that the word "*rent*," as used in the Land Revenue Act, must not be understood in any sense other than that which I have interpreted it in the Rent Act.

What I have already said is sufficient to show that upon the case as set up by the plaintiff himself, the grant in this case was free of "*rent*," in the sense in which that word must be understood both in the Rent Act and in the Land Revenue Act. But I will go further and show how the definition of the word in those

two enactments may be accepted in an intelligible sense without involving the inconsistencies to which I have referred. The truth seems to me to be that the word "rent," which has found its way into the two enactments above referred to from the old Regulations of the East India Company, is used probably as the equivalent of the Hindustani words *lagán* or *poth*, which are well understood in the country as representing the compensation receivable by the landlord for letting the land to a *kashtkar* or cultivator. It is equally well known that such compensation, ever since the reign of the Emperor Akbar, when his Revenue Minister, Raja Todar Mal, introduced his system, payments of *lagán* were made in three ways. The first of these was *batái* or division of the produce in kind, of which the zamindar, or where such rights did not exist, the Government, took a certain proportion. When cash payments were introduced instead of *batái*, one method was to make an estimate or appraisement of the crops, and to take in cash what would represent the due proportion as the *lagán*. The third method was cash payments of fixed *lagán* agreed upon by the *kashtkár*, and irrespective of the nature, quality or quantity of the produce. This last was perhaps the most recent outcome of Maharaja Todar Mal's powerful administrative intellect, and this is the system which has received encouragement all over India under the British rule. But neither the old Regulations nor our present Land Revenue and Rent Acts force the zamindar to adopt the system of pure cash payments in preference to the other two methods. I am unaware of any further kind of "rent" or *lagán* which went beyond the principle of the three main methods which I have thus described, though there were mixed methods of paying rent. At any rate, so long as the law does not make the matter so clear as to place it beyond doubt, I shall not be willing to interpret the word "*rent*" as used in the Revenue and Rent Acts in any such way as would operate in defeasance of the rights of the agricultural population.

But what do those two Acts themselves indicate? I have already shown that they cannot, without involving immense inconsistency, be taken to use the word "*rent*" as including the services of a mimic. And I will now show that there is every indication that the Rent Act uses the word in no sense which

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goes beyond the principle of the three old methods of receiving *lagán* from *kashtkárs* or cultivators And once this interpretation of the word "*rent*" is accepted, the whole Act becomes consistent and intelligible. We have then s. 24, cl. (*b*), relating to purely cash payments, and cl. (*c*) relating to the instalments of such payments. Then comes cl. (*e*), which distinctly relates to the other two kinds of *lagán*, namely, "rent payable in kind" or "calculated on a valuation of the produce"—the former being *batái*, and the latter being usually called *kankút* in most parts of the country. The three methods of receiving rent are kept in view throughout by the Act, and whilst in connection with purely cash payments no great difficulties as to the amount of rent can arise, we have the whole of s. 43 devoted to providing rules in respect of the other two methods of realising *lagán* or *rent*, with the object of providing a remedy both for the landlord and the tenant. The provisions, then, both in respect of distress and suits for recovery of rent, become intelligible, and the body of the Act presents no contradiction of its preamble. And in this light the definition of "rent" in cl. (2), s. 3 of the Act, when it uses the three words "paid, delivered or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent *rendered* by appraisement, the native words for the three methods being "*naqad*," "*batái*," and *kankút*."

I may here add that lands held under any other system, that is to say, lands granted either for past or continuing services, or for personal merit or worth (as in the case of religious or charitable grants), which involved no rent in any of the three forms above described, were all known under the generic name of *muáfi* or "rent free"—a term having many sub-divisions (such as *shankalap*, &c.), and one of them is well known as *chákrán* or *chákri*, that is, service tenure, to which s. 41, Regulation VIII. of 1793, related, rendering them liable to redemption and assessment. All these were regarded as "rent-free," simply because they were not subject to anything which could be called "*rent*," whatever the origin, the motive, the object or the conditions of the grant, may have been. In the present case, according to the plaintiff's own allegation, "the father of the plaintiff remitted the rent of the land in suit to the ancestors of Nasiba, defendant, on the occasion of the birth of

Muhammad Ismail Khan, plaintiff, on the condition of his performing the services of *naqqál* (mimic). The ancestors of Nasiba and Nasiba himself continued to perform the services in lieu of the rent of the land, and they were recorded in the settlement papers to be in possession as servants." This, taken at its best, would go to show that no "*rent*" in the sense in which I have explained the word was taken for the land. There is indeed no allegation to this effect, and the finding of the lower appellate Court is the same. The grant, then, putting the plaintiff's case at its best, was a rent-free grant of the nature of *chák-i*.

This being so, the question arises whether such rent-free grants fall under the purview of s. 30 of the Rent Act, or of ss. 79-89 of the Revenue Act, so as to oust the jurisdiction of the Civil Courts under s. 95, cl. (*c*), of the former, or under s. 241, cl. (*h*), of the latter Act. The answer to this question, as I have already shown, has been given in two different ways in the two rulings of this Court, to which I have already referred. In *Puran Mal* v. *Padma* (1) the first point in the *ratio decidendi* was that the operation of s. 30 of the Rent Act, as well as of s. 79 of the Revenue Act, must be restricted to such grants as were contemplated by s. 10 of Regulation XIX of 1793. I am willing to concur in this proposition. But then what was the scope of that section of the Regulation? The answer given by the ruling is, that it is limited to "permanent grants," and would not include grants under which the grantee "would continue to occupy it as long as he continued to give his services." With due deference, I am unable to accept this limitation of the scope of that Regulation or of the sections of the present Rent and Revenue Acts already referred to. A grant for 999 years (a not unusual term of an English lease) is not a *permanent* alienation, and I do not think such a grant would be excluded from the operation of the Regulation and the Acts to which I have referred. To impose a restriction upon general expressions, especial reasons or express words are necessary, and whilst there is nothing in those enactments to justify the restriction, the principle upon which they proceed clearly indicates that the policy on which the prohibition as to such grants proceeds would be applicable as much to permanent grants as to grants for a term of years.

(1) I. L. R., 7 All. 732.

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The policy of the law, as indicated by the preamble of the Regulation, seems clear enough. In India, what would be called freehold in England, vests in the State till it itself alienates its rights to private individuals. The ultimate ownership of the soil thus rests in the State, but upon the soil, in this part of the country, exists two classes of interests. The first is that of the cultivator, who makes that soil yield produce; the second is that of the zamindar, who standing in the position of the middleman, facilitates the recovery by the State of its share of the produce. The share of the State is called *revenue* as distinguished from *rent*, which is the share of the zamindar in the produce of the soil. He takes the rent from the cultivator, and out of such rent pays over the share of the State. He is called proprietor; but his proprietorship is qualified by the great incident that if he does not pay the Government revenue his proprietorship ceases, much in the same manner as non-payment of a mortgage results in foreclosure or sale of the property. Such being the nature of zamindari rights, it is then that upon the maxim that no one can give more than he has, any alienation of land by the zamindar, purporting to make it free of its liability to Government revenue, would be void. Upon general principles he may indeed alienate his own right to take rent; but even in respect of such alienations the State is so far interested that the zamindar thereby reduces his own pecuniary means to meet the Government demand of revenue. Such alienations, whether permanent or temporary, have this tendency in effect *pro tanto*.

Regulation XIX of 1793 was passed to obviate both these evils *inter alia*, and s. 10 has this double aspect. On the one hand, it declared the invalidity of "all grants for holding land exempt from the payment of revenue," and, on the other hand, it required and authorized persons possessing "the proprietary right in any estate" "to collect *rents* from such lands at the rates of the pargana, and to *dispossess* the grantee of the proprietary right in the land, and to re-annex it to the estate or *talúq* in which it may be situated." These two aspects of the Regulation appear in other parts of it also, and the sections of the present Rent and Revenue Acts (above referred to) aim at the same two results. Under certain conditions they authorize proprietors "to *resume*

such grants or to *assess rent* on the land"—the former right involving eviction of the grantee, the latter implying that he is left in possession, but is made liable to payment. But both these remedies, as I have already indicated, have for their ultimate aim the security of the Government revenue, which the law declares is the first charge upon land, and s. 83 of the Revenue Act declares that " no length of rent-free occupancy of any land, nor any grant of land made by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue."

I have described these matters at such length because they show the whole policy of the law, and afford indications of the principles which regulate questions of jurisdiction. It may be stated as a general rule that all matters affecting or regulating Government revenue are placed by the Legislature beyond the jurisdiction of the Civil Courts, for reasons of policy which it is beyond my province to question. S 241 of our Revenue Act justifies this observation, whilst s. 95 of the Rent Act indicates the same conclusion. And if this interpretation is right the present suit could not lie in the Civil Court.

But what is the nature of the suit? It begins by stating facts which mean a " rent-free grant " according to my interpretation of the term. Then the reason for resumption is stated to be that " the defendant (Nasiba) having acquired the knowledge of Persian, does not now perform the services of a *naqqál* (mimic), and he has sold the land to Waris Ali, defendant, for Rs. 150, on the 26th May, 1883. As the defendant has discontinued performing the services, he has no right to the land, nor was he competent to make the sale, nor could the vendee (Waris Ali) acquire any valid title." The defence of Nasiba was that the land was given to his ancestors rent-free " hundreds of years ago " as a reward, and that " the *naqqál* has to perform no services, nor was this land given to the ancestors of the defendants subject to any condition." The defence of the vendee, Waris Ali, was in keeping with that of his vendor, Nasiba, in whom he set up a proprietary title. Such being the dispute, it seems to me that it was "a matter provided for in ss. 79 to 89 (both inclusive)" of the Revenue Act, within the meaning of cl. (*h*)

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of s 241. And for similar reasons it would fall under cl. (c) of s. 95 of the Rent Act. And this conclusion is supported by the only finding of fact at which the lower appellate Court has arrived. The learned Judge says :—"As far as the evidence on the record goes, it seems to prove that occupation of the land by Nasiba's predecessors *free of rent* had its origin in services rendered by those persons to the zamindars. They were mimics, and doubtless followed their calling, and amused the company at marriages and festivals. Nasiba has ceased to follow the calling of a mimic, and the plaintiff wishes to *eject* him from the land or *assess rent* upon it. This is the best finding on the facts at which this Court can arrive."

Upon this finding, which we are bound to accept in second appeal, it seems to me clear that no rent, either in kind or in cash by valuation of the crops, or in cash by fixing the amount, was ever paid for the land. And if this is so, that land constituted a rent-free grant, and the claim amounts to nothing more or less than resumption of such grant or subjecting it to assessment of rent.

The exact terms of the grant do not appear from any document or any specific oral evidence. All that has been said or proved is, that the grant was made on the occasion of the birth of a son in lieu of services as a mimic or *naqqál*. But there is nothing to establish that the continued performance of such services was the condition upon which the grant was to be held. To use the words of the Lords of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (1), "there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands." And their Lordships went on to say :—"Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that, the service ceasing, the tenure should

(1) 13 Moo. I. A., at p. 464.

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determine." And no such conditions being proved, their Lordships said:—"Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services." Whether the grant in this case was of this nature or of the other, it was a rent-free grant all the same; and in calling it "rent-free" I am only using the expression as employed by the Lords of the Privy Council in the case just referred to. And this being so, the incidents of the tenure as to resumption or assessment of rent would be governed by s. 30 of the Rent Act and ss. 79-84 of the Revenue Act, being matters which lie beyond the jurisdiction of the Civil Court. Whether the defendant Nasiba had, under those provisions, acquired a proprietary title under cl. (*d*) of s. 30 of the Rent Act, or under s. 82 of the Revenue Act, is a question which, for want of jurisdiction of the Civil Court, I am not called upon to determine in this case. For it is admitted that such rights as Nasiba had have been sold by him to Waris Ali, appellant, under the sale-deed of the 26th May, 1883, and the latter therefore stands in the shoes of the former, for purposes either of resumption or of assessment of rent. Nor do I, under this view, feel myself called upon to decide the question of *res judicata*, or to enter into the merits of the case, and the only ground upon which I base my judgment is the want of jurisdiction of the Civil Court. For these reasons, I regret I am unable to concur with my learned brother Oldfield in the conclusions at which he has arrived, and I would decree this appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

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GAYA (DEFENDANT) *v.* RAMJIAWAN RAM (PLAINTIFF) *

Lease—Istimrari patta—Hereditary title—Construction of patta.

In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows:—"So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it

* Second Appeal No. 1215 of 1885, from a decree of Pandit Kashi Nath, Additional Subordinate Judge of Ghazipur, dated the 22nd May, 1885, reversing a decree of Maulvi Syed Muhammad Ashgar Ali, Munsif of Saidpur, dated the 17th January, 1885.

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may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.-W. P. Rent Act (XII. of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

Held that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh* v. *Ramnarain Singh* (1) followed. *Lakhu Kowar* v. *Harikrishna Singh* (2) dissented from.

THE plaintiff in this case, on the 24th July, 1873, gave two persons called Jag Lal and Har Prasad a lease of certain land, the terms of which were as follows :—

"I, Ramjiawan, * * * * do hereby declare as follows :—I have given a perpetual lease (*patta istimrari*) of 24 bighas of land, bearing numbers as given below, situated in mauza Raghunathpur, otherwise called Bilauripur, pargana Shadiabad, on a rent of Rs. 48 a year, at the rate of Rs. 2 per bigha, besides the acreage and the patwári's fee, to Jag Lal, *Jati*, and Har Prasad, *Jati*, residents of Raghunathpur, in equal shares, and do hereby stipulate and covenant in writing that they may get into possession and cultivate the land from 1281 fasli, and pay me its rent every year, and at due instalments, and obtain receipts bearing my signature. They should never make a default. In case of the rent falling in arrears, I shall have the power to oust them without the assistance of the Court. They shall not make an objection on the score of weather contingencies, or of any act of the Sovereign, and pay the rent without any objection. So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the lands in any way. I have, therefore, executed these few words by way of a perpetual lease, that it may be used when needed."

The lessees being dead, the defendant, who was in possession of the land, claimed, as heir to Har Prasad, to be the lessee of a

(1) I. L. R., 12 Calc. 117. (2) 3 B. L. R. 226.

moiety of the land under the lease, asserting that the lease was one creating a heritable interest. This claim was allowed by the settlement officer, and the plaintiff accordingly brought this suit to have it declared that he was entitled to issue a notice of ejectment to the defendant, under the provisions of s. 36 of the N.-W. P. Rent Act (XII. of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

The Court of first instance dismissed the suit for reasons which it is not necessary to mention. On appeal by the plaintiff the lower appellate Court held, on the construction of the lease, that it did not create a heritable interest, but a life interest only, and decreed the claim. The defendant appealed to the High Court.

Mr. *Amir-ud-din* and Lala *Lalta Prasad*, for the appellant.

Mr. *Howell* and Munshi *Sukh Ram*, for the respondent.

STRAIGHT, Offg. C. J.— I think this appeal fails. The Subordinate Judge, having regard to the language of the lease of the 24th July, 1873, was of opinion that its proper interpretation was that it was not, as alleged by the defendant-appellant, a lease in perpetuity, or one that created any heritable interest. Now no doubt the word "*istimrari*" is used in several places in this document, and it was contended by the learned counsel for the appellant that the use of this word was sufficient of itself to show that what the parties intended was, that the lease should continue binding, not only so long as the fixed rent was paid, and that the interest granted by the plaintiff was not a mere life but a heritable interest. He supported this contention by referring us to the case of *Lakhu Kowar* v. *Harikrishna Singh* (1), and no doubt if that authority is correct in law, it favours his view. But our attention has been called by the learned pleader for the plaintiff-respondent to a ruling of their Lordships of the Privy Council in the case of *Tulshi Pershad Singh* v. *Ramnarain Singh* (2), which appears to be directly apposite to the present case. Their Lordships here remark that "the words *istimrari* and *muqarrari* in a patta do not, *per se*, convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned ("*bafazandan*"

(1) 3 B. L. R. 226. (2) I. L. R., 12 Calc. 117.

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or "*naslan bad naslan*"), as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." Now as I understand these observations of their Lordships, the mere use of the word *istimrari* in the instrument with which we are dealing, does not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee. Their Lordships, as I understand them, also say that the words "from generation to generation," "*naslan bad naslan*," must not necessarily be inserted in an instrument of lease in order to constitute a grant in perpetuity, and that the word *istimrari*, accompanied by other words and illustrated by the subsequent conduct of the parties, and in acting upon the instrument, may show that an estate of inheritance was intended. The learned counsel urges that the words used in the lease before us, namely, "so long as the rent is paid I shall have no power to resume the land," are sufficient to show that the lease was one in perpetuity ; but I confess that those words do not convey to my mind any such meaning or intention. Had the lease been clearly expressed as one for the life of the lessee, or for the joint lives of two lessees, or have been a lease for five or ten years, those words might equally as well have been used.

I cannot, therefore, hold that the construction put upon the lease by the lower appellate Court is erroneous. Its decision that the defendant-appellant (even should he be, as he claims to be, the legal heir and representative of one of the lessees) is not a person who can resist the plaintiff's claim, is correct, and its finding appears to me to be quite in accord with the terms of the document and the facts of the case as evidencing the intention of the parties. The appeal therefore fails, and must be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion.

Appeal dismissed.

Before Mr Justice Oldfield and Mr. Justice Mahmood.

1886
July 30.

NUR-UL-HASAN (JUDGMENT DEBTOR) *v* MUHAMMAD HASAN AND OTHERS (DECREE-HOLDERS).*

Execution of decree Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179 (2).

Art. 179, cl. (2), of the Limitation Act (XV. of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.

A suit for pre emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March, 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree.

Held that art. 179, cl (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by limitation.

Hur Proshaud Roy v. *Enayet Hossein* (1) and *Sangram Singh* v. *Bujharat Singh* (2 distinguished. *Mullick Ahmed Zumma* v. *Mahomed Syed* (3) and *Ram Lal* v. *Jagannath* (4) relied on.

THE decree-holders in this case, Muhammad Hasan and Miyan Muhammad, having brought a suit to enforce the right of pre-emption in respect of the sale of certain property, two persons named Amir Chand and Khurshed Husain brought a suit claiming a similar right in respect of the same sale. These persons were added as defendants in the suit of Muhammad Hasan and Miyan Muhammad. On the 7th March, 1882, Muhammad Hasan and Miyan Muhammad obtained a decree in respect of a moiety of the property in dispute against the vendors, the purchaser, and Amir Chand and Khurshed Husain, the rival claimants to the right of pre-emption. The vendors and the purchaser did not appeal from this decree, but the rival claimants to the right of pre-emption, Amir Chand and Khurshed Husain, did, and the decree of the 7th March, 1882, was affirmed by the Court of first appeal on the 12th

* Second Appeal No. 62 of 1886, from an order of T. Benson, Esq., District Judge of Saháranpur, dated the 2nd April, 1886, reversing an order of Maulvi Tajammul Husain, Munsif of Shamli, dated the 27th June, 1885.

(1) 2 Calc L Rep. 471.
(2) I. L R, 4 All. 36.
(3) I. L R., 6 Calc 194
(4) Weekly Notes, 1881 p. 138.

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May, 1882. Amir Chand and Khurshed Husain then preferred a second appeal to the High Court, but the appeal was dismissed and the decree of the Court of first appeal affirmed.

On the 12th May, 1885, Muhammad Hasan and Miyan Muhammad, decree-holders, applied for delivery of possession in execution of decree. This application was objected to by the purchaser judgment-debtor, Nur-ul-Hasan, on the ground that it was barred by limitation. He contended that it should have been made, so far as he was concerned, within three years from the date of the original decree, the 7th March, 1882, from which he had not appealed, and that not having been so made, it was made beyond time.

This contention the Court of first instance allowed, and dismissed the application. On appeal by the decree-holders the lower appellate Court held that limitation began to run from the date of the High Court's decree, and the application having been made within three years from that date was within time, and directed that execution should issue.

The judgment-debtor appealed to the High Court, again contending that limitation should be computed from the date of the original decree.

Mr. *Amir-ud-din* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

OLDFIELD, J.—The matter in this appeal relates to the execution of a decree obtained for a right of pre-emption. It appears there were two sets of pre-emptors. The first set are respondents before us. They brought a suit against the vendors, the vendee (who is the appellant before us), and the other set of pre-emptors, and obtained a decree for a moiety of the property. This decree is dated the 7th March, 1882. Out of the defendants, the second set of pre-emptors alone appealed, and their appeal was dismissed on the 12th May, 1882. The decree-holders (respondents) applied to execute their decree on the 12th May, 1885, and this application, being objected to by the purchaser, the appellant before us, was disallowed by the Munsif, but on appeal to the lower appellate Court the Munsif's order was reversed, and execution granted against Nur-ul-Hasan, the purchaser of the property. He has now

preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails, because art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree; and so far as he is concerned, the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants. On this point certain decisions have been brought to our notice.—*Hur Proshaud Roy* v. *Enayet Hossein* (1); *Sangram Singh* v. *Bujharat Singh* (2). I think those cases are distinguishable from the present case: as in this case, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of art 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the appellate Court. It contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal, the date of the final decision of the appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking, that in the present case limitation should run from the date of the appellate Court's decree, I may refer to *Mullick Ahmed Zumma* v. *Mahomed Syed* (3) and *Ram Lal* v. *Jagannath* (4).

I would dismiss the appeal with costs.

(1) 2 Calc. L. Rep 471.
(2) I. L. R., 4 All 36.
(3) I. L. R., 6 Calc. 194.
(4) Weekly Notes, 1884, p. 138

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MAHMOOD, J.—I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of art. 179 there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed ; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged by any of the parties to the original proceedings ; and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal.

I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step in aid of execution, which is another ground for extending the time for execution, as provided in the 4th clause of the same article. This I mention only by way of analogy, and regarding it as such, I think it was sufficient to justify the decree-holders not applying for execution before the appeal was decided.

Under these circumstances the application for execution is within time, and I agree with my learned brother's order dismissing this appeal with costs.

Appeal dismissed.

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August 2.

FULL BENCH.

Before Mr. Justice Straight, Offg Chief Justice, Mr. Justice Oldfield, Mr. Justice Mahmood and Mr. Justice Tyrrell.

JADU RAI AND ANOTHER (DEFENDANTS) *v.* KANIZAK HUSAIN AND OTHERS (PLAINTIFFS).*

Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor—Civil Procedure Code, s. 191.

The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this

* Second Appeal No. 1155 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 18th July, 1885, confirming a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Allahabad, dated the 24th June 1884.

point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below.

Held by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Das* v. *Narain Lal* (1) and *Afzal-un-nissa Begam* v. *Al Ali* (2) discussed.

Per STRAIGHT, Offg C.J., that as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticised on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

Per OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the word, and the proceedings must be set aside *Jagram Das* v. *Narain Lal* (1) and *Afzal un nissa Begam* v *Al Ali* (2) followed.

Per MAHMOOD, J., that although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date; that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trials; that the Judge who succeeds another after a trial which has partly proceeded

(1) I. L. R., 7 All. 857. (2) *Ante*, p. 35.

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before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto* evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made"; that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge; that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s 564 of the Code to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that where further issues are directed to be tried, or additional evidence is to be taken, the Court of appeal is bound to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial; that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Jagram Das v. *Narain Lal* (1) and *Afzal-un-nissa Begam* v. *Al Ali* (2) dissented from.

Per TYRRELL, J., that in reference to the Full Bench the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagram Das* v. *Narain Lal* (1) and *Afzal-un-nissa Begam* v. *Al Ali* (2) followed and explained.

This was a reference to the Full Bench by Straight, Offg. C. J., and Mahmood, J., of the following question:—"Whether, with reference to the first and second grounds of appeal, and having reference to the circumstances disclosed in the proceedings of the Court of first instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." It was further stated that the reference was made for the special purpose of considering the effect of the judgments of the Court in *Jagram Das* v. *Narain Lal* (1) and *Afzal-un-nissa Begam* v. *Al Ali* (2). The first and second grounds of appeal mentioned in the question referred to the Full Bench were as follows:—"First, because there exists a substantial defect in the procedure followed by the learned

(1) I. L. R., 7 All. 857. (2) *Ante*, p. 35.

Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; second, because the learned Subordinate Judge cannot be said to have tried the case."

The proceedings in the Court of first instance and the mode in which the judicial officer who passed the decree dealt with and determined the suit, were as follows:—The suit was filed in the Court of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, on the 31st March, 1883. A written statement of defence was filed, issues were framed, witnesses were examined on both sides, and various adjournments took place, up to the 3rd March, 1884. Upon that date the examination of witnesses was concluded, and an order was passed by the Subordinate Judge in these terms:—"As this case is complete, it is ordered that the 14th March, 1884, be fixed for hearing arguments. Pleaders to be informed." At this point Babu Abinash Chandar Banarji succeeded Babu Ram Kali Chaudhri as Subordinate Judge of Allahabad. On the 10th May, 1884, he passed the following order:—"In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and as he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and that the 13th May, 1884, be fixed for decision." On the 13th May there was a further adjournment to the 16th June, and ultimately, on the 24th June, 1884, the Subordinate Judge delivered judgment after hearing what he described as "very able and lengthy arguments on both sides." Judgment was in favour of the plaintiff, and the defendants appealed to the District Judge of Allahabad, who, on the 18th July, 1885, affirmed the first Court's decree.

No objection appeared to have been raised in the first Court, or taken as a ground of appeal before the District Judge, to the course adopted by Babu Abinash Chandar Banarji. The defendants preferred a second appeal from the decision of the District Judge to the High Court, the only grounds which need be mentioned being those already set forth.

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Mr. *W. M. Colvin*, Babu *Dwarka Nath Banarji*, Munshi *Hanuman Prasad*, Munshi *Ram Prasad*, and Lala *Juala Prasad*, for the appellants.

Mr. *G. E. A. Ross* and Mr. *Shivanath Sinha*, for the respondents.

STRAIGHT, Offg. C. J.—In my opinion the question put by this reference must be answered in the affirmative. It is not contested that the learned Subordinate Judge has jurisdiction territorially and pecuniarily to try the suit, and the single point appears to be, did he try it, or, in other words, did he hold a legal trial? It is conceded by the appellants' learned counsel that no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the way that he did; on the contrary, he is admitted to observe correctly in his judgment, where he says—"I have heard very able and lengthy arguments on both sides. *The evidence has been minutely dissected and criticized*, and many probabilities urged upon both sides." It is obvious from this passage that, if there could have been a waiver on the part of the appellants in reference to the action of the Subordinate Judge, of which they seek now to complain in special appeal, there was such waiver. In short, their position is this, that having appeared before the Subordinate Judge and consented to his doing what he did, and thus taking their chance of succeeding on the merits, they are nevertheless now to be allowed to turn round and say all that was done was illegally done, and there was no trial at all. I presume it would hardly be seriously contended that if a Court issue a summons to a defendant to appear on a certain date for the mere settlement of issues, and the defendant appears on that date and consents to the suit being then and there disposed of, and makes his defence, such defendant can afterwards be permitted to object that the summons to him was for settlement of issues only, and not for final disposal of the suit. I confess I see no serious distinction between such a case and the present, where the Subordinate Judge having undoubted jurisdiction to try the suit, the parties consented to his trying it by waiving certain rules of procedure enacted in the interests of suitors personally, and not for any public object. I cannot think that the late learned Chief Justice of this Court, in the decisions quoted by the appellants'

learned counsel, ever intended to lay down that, under circumstances such as these, the Subordinate Judge must be held to have acted without jurisdiction, and that his proceedings, adopted on consent of parties, were void. If he did, I can only say with the most profound respect that I dissent from such a view, the inconvenience and hardship of giving effect to which would be strikingly illustrated by the particular case out of which the reference has arisen.

For these reasons, as stated at the outset of my remarks, I answer the reference in the affirmative.

OLDFIELD, J.—This reference raises a question in regard to the scope and intent of the provisions of s. 191, Civil Procedure Code, by which, when the Judge taking down any evidence or causing any memorandum to be made under Chapter XV. dies, or is removed from the Court before the conclusion of the suit, his successor may, if he think fit, deal with such evidence or memorandum as if he himself had taken down or caused it to be made.

The question has already been before this Court in the case of *Jugram Das* v. *Narain Lal* (1) and *Afzal-un-nissa Begam* v. *Al Ali* (2), and in the exposition of the law given by Petheram, C. J., relating to trial of cases, when the trial had been begun by one Judge and taken up by another, I entirely concur.

Petheram, C. J., observes:—"His business (that of the Judge taking up the trial of a case begun by another) was to try the case according to law; and if he did not so try it, he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV. of the Code. He should have fixed a day for the entire hearing of the suit before himself, and in that case the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191, Civil Procedure Code, which enacts that a Judge, in the hearing of

(1) I. L. R., 7 All. 857. (2) *Ante*, p. 35.

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a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular; and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection." And in *Afzal-un-nissa Begam* v. *Al Ali*, he observes:—"The question then arises:—What was the duty of Maulvi Zain-ul-abdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first day on which the case had ever come on for hearing, except that the parties should be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different way. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

In the above observations I entirely concur.

The law permits a Judge taking up a trial begun by another Judge, to deal with the evidence taken by his predecessor as if he himself had taken it down; but this permission does not relieve him of the duty of dealing with it judicially, of trying the cause as though it had come before him in the first instance. The trial is, in fact, begun *de novo* before him; he may deal with the evidence already taken as if he himself had taken it, but he must deal with

it judicially by allowing counsel to put in the evidence and hearing argument on it. In fact, there must be a hearing of the entire case before himself. The proper procedure, and the safest, to pursue is no doubt that pointed out by Petheram, C. J.

In every case, however, we have to see whether, as a matter of fact, there has been a real trial, a hearing of the entire case by the Judge; whether, looking to what has taken place, the evidence previously taken was judicially dealt with, counsel heard upon it, and the entire case fully heard and tried. If this has not been done, there has been no trial in the legal sense of the word, and the proceedings must be set aside.

In the case referred to us, I find that the Judge fixed a day for hearing, and having heard counsel on the case, delivered judgment. There is no reason to suppose that the trial was other than sufficient and proper, and that there was not an entire hearing of the cause.

MAHMOOD, J.—The question referred to the Full Bench in this case is—"Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of first instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." The two grounds of appeal referred to in this question are—"*First*, because there exists a substantial defect in the procedure followed by the learned Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; and *secondly*, because the learned Subordinate Judge cannot be said to have tried the case."

Neither of these grounds was taken in the lower appellate Court, and there can be no doubt, as was intimated by the learned counsel for the appellant, that these grounds have been taken owing to the practice which has sprung up in this Court, during the last year, in consequence of two rulings of Petheram, C.J., the late learned Chief Justice of this Court. The first of these rulings is the

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case of *Jagram Das* v. *Narain Lal* (1), the effect of which can be best summarized in the words of the head-note in the report. In that case a Subordinate Judge having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. It was held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides and the arguments on behalf of both, and then, finally, decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor, to be put in; and that, in neglecting to take this course and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities. This ruling — to use the words of Petheram, C.J., himself—"led to some confusion as to the mode in which cases of this kind should be dealt with;" and the learned Chief Justice in a later ruling—*Afzal-un-nissa Begam* v. *Al Ali* (2)—took opportunity to point out what appeared to him the course which should have been adopted in that case, which he regarded as "a fair illustration of what commonly happens." The head-note of the report in that case summarizes the effect of the ruling, and it appears that what happened in that case was, that a Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed. It was held by the learned Chief Justice that the trial, so far as it had gone

(1) I. L. R., 7 All. 857. (2) *Ante* p. 35.

before the first Subordinate Judge, was abortive, and, as a trial, became a nullity ; and it was also held that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

These two rulings constitute the exposition of the law upon which Mr. *Colvin* has relied, and it will be my duty to consider the *ratio decidendi* upon which these two rulings proceed. But the learned counsel has also relied upon certain unreported cases which were submitted at the hearing. One is the case of *Malik Fakir Bakhsh* v. *Chauharja Bakhsh Singh*—(F. A. No. 88 of 1884, decided on the 7th July, 1885)—in which Petheram, C. J., made certain observations, which may be quoted here as affording indications of the view which he entertained :—" It appears to be a general opinion in this country that it is in the power of a new Subordinate Judge to take up a case which has been partly heard by his predecessor, and to continue the same trial; and so in this case the parties appear to have given a sort of consent to the adoption of this course. But I am of opinion that this view of the law is wrong. A trial must be one, and must be held before one Court only. There are provisions which enable evidence taken by one Judge to be put in and used as evidence by his successor; but there is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off. He could only allow the evidence previously taken to be used as evidence under s. 191 of the Civil Procedure Code, in a case wholly tried by himself. I have already fully explained my views on this subject in the case of *Jagram Das* v. *Narain Lal;* and for the reasons which I there stated, I am of opinion that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his file, and try it according to law." The next

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unreported case which has been cited is *Sah Kirpa Dayal* v. *Musammat Rani Kishori*—(F. A. No. 108 of 1884, decided on 3rd November, 1885)—to which Petheram, C. J., was again a party, and in which the ruling in the case of *Jagram Das* was again followed, with the result of annulling all the proceedings, and directing a fresh trial of that case and also of another connected case "according to law." Again, another unreported case is *Musammat Jasodha Kuar* v. *Lal Ishri Prasad Narain Singh*—(F. A. No 127 of 1884, decided on 3rd February, 1886)—in which the ruling in *Afzal-un-nissa Begam's Case* was simply followed, and the whole trial was declared to be bad in law, and the proceedings being annulled, the case was remanded to the Court below, to be placed on the register of original suits and disposed of "according to law." The same was the view followed in another unreported case—*Shaikh Ghulam Imam* v. *Shaikh Jafar Ali* (S. A. No. 980 of 1885, decided on 26th March, 1886)—and this is the last of the unreported cases which have been cited by Mr. *Colvin* as having regulated the practice of this Court since the two rulings of Petheram, C. J., which have been reported and already referred to.

As there has been much difference of opinion as to the exact meaning and effect of these rulings, I think it is necessary to analyze the various steps of reasoning upon which the judgments of Petheram, C. J., seem to proceed according to my interpretation. The various points which indicate the line of his Lordship's argument are:—

(1).—"A trial must be one, and must be held before one Court only."

(2).—When a suit is tried the "original date would be the date of hearing, and all subsequent dates would be those of adjournments;" so that where a trial goes on for more than one day, every hearing after the original date "would be a proceeding held by adjournment in the trial *heard on the original date*."

(3)—"There is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off."

(4).—Where the Judge who had partly heard a case died or was removed, "the trial, so far as it had gone before him, was *abortive*, and, as a trial, became a *nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him."

(5).—The new Judge must, therefore, "fix a day for the *entire hearing* of the suit before himself," and must "re-hear it from beginning to end;" for the law does not "enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

(6).—There would thus be two separate trials and two different hearings of the cause; and "the law nowhere says that the two hearings may be *linked together* and virtually made one."

(7).—Every succeeding Judge, who is appointed before the conclusion of the trial, must therefore fix a new day for commencing the trial *de novo*, and when the time arrived "the trial would proceed in the ordinary way, as if the day were the *first* on which the case had ever come on for hearing."

(8).—The evidence taken by the preceding Judge would not, by the mere fact of being upon the record, be evidence in such new trial, nor could it be dealt with as material upon which a judgment might proceed.

(9).—But in the trial before the new Judge "the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner;" that is, "by putting in the depositions which had been taken before his predecessor."

(10).—But if the depositions are not so "put in," that is, proved as evidence in the new trial, the Judge using them would be deciding "a case upon materials which are not before him," because such Judge had not "taken the evidence" himself.

(11).—The former trial having already become a nullity, and the evidence taken therein not being put in as evidence in the new trial, the judgment and decree which may proceed upon such evidence would be "absolute nullities;" because a Judge who, in trying a case, adopts such a procedure "had no jurisdiction to try it at all."

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(12).—And when such judgment or decree is passed, the appellate Court, regarding the whole proceedings in the case as nullities, should set them aside and remand the case for a new trial.

These seem to me to be the various points laid down in the rulings to which I have referred, so far as I can understand them, and I have stated each proposition, as closely as I could, in the words of Petheram, C. J.

In this state of things it is important, for realizing the full bearing and effect of these cases, to observe that all of them, whether reported or unreported (with the exception of that last mentioned), were more or less heavy first appeals involving complicated questions of fact and troublesome questions of law; and also that in none of those cases did the appellant object in the Court of first instance to the course which that Court adopted, nor did he complain of the course in his grounds of appeal by taking the point upon which this Court set aside all the proceedings of the Court below and ordered trials *de novo*. Indeed, in the case of *Malik Fakir Bakhsh*—to use the words of Petheram, C. J.—"the parties appear to have given a sort of consent to the adoption of this course"—the very course which the learned Chief Justice declared, apparently, *suo motu*, to be so null and void in law as to render the whole trial a nullity, and to necessitate the case being remanded to the first Court to begin the trial anew. The reason why I mention this circumstance is, that it is only in very exceptional cases that this Court, ever since I have had the honour of being associated with it, either as a member of the Bar or as a temporary Judge, allows parties appellants to obtain reversals of the decrees of the Courts below upon grounds not taken either as objections in the Court below or as grounds in the memorandum of appeal. And it is only in equally exceptional cases that this Court exercises the power which, as a Court of appeal, it undoubtedly possesses, of basing its judgment upon grounds which the parties do not urge, and which do not form part of the *ratio decidendi* upon which the judgment of the Court below proceeds. Further, this Court, so far as I am aware, has been accustomed, till the new practice introduced by Petheram, C. J., during the

last year, to bear in mind the enormous delay and expense which fresh trials involve, and the usual course has been to abide by the express mandate of the Legislature as contained in s. 564 of the Civil Procedure Code, which prohibits the remand of cases for second decision, except under conditions covered by s. 562 of the Code.

The policy of the law, as apparent from these sections, is obvious. Delay in the disposal of litigation and the expense to the parties, are considerations which the Legislature has not ignored, and the appellate Court, at least in first appeals, is invested with authority, under s. 566 of the Code, to remand issues for trial, if those issues have never been duly framed or tried; and s. 568 empowers the Court of appeal to take further evidence itself, or to order such further evidence to be taken by the lower Court when necessary. It is only when the erroneous view of the lower Court upon a preliminary point has prevented it from taking the evidence in the case, within the meaning of s. 562 of the Code, or where there is want of jurisdiction or absolute illegality, that trials *de novo* are ordered, and it must therefore be taken that in the heavy first appeals above referred to, in which such fresh trials were directed, the only *ratio* could have been that the proceedings of the first Court in those cases were taken without jurisdiction and amounted to absolute nullity.

Now, in the case of *Jagram Das*, what happened was, that Maulvi Sami-ul-la Khan was the presiding Judge of the Court in which the suit was instituted, and a day was fixed for hearing of the case. Then, to use the language of Petheram, C. J., "the plaintiff's counsel opened his case, and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's counsel to reply. At this point Maulvi Sami-ul-la Khan was sent on a special mission to Egypt and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court." Under this state of things the learned Chief Justice, referring to the new Subordinate

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Judge, went on to say:—" His business was to try the case according to law ; and if he did not so try it, he had no *jurisdiction* to try it at all." I am bound to hold that the learned Chief Justice, in using the word "*jurisdiction*," duly realized the meaning of that expression as a term of law as distinguished from "*irregularity*," another term of law. Then the learned Chief Justice went on to say, with reference to the new Subordinate Judge :—" All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing, under Chapter XV. of the Code. He should have fixed a day for the *entire hearing* of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular ; and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a *new trial ;* but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion this was an *absolutely illegal* course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

Now, with profound respect for the eminent legal authority from whom these observations emanate, I cannot help feeling that they proceed upon some misapprehension of the procedure of the Courts of first instance in the Mufassal; and that the procedure taken by the Subordinate Judge, which was characterized by the learned Chief Justice as " one which cannot be justified by any system of law," was scarcely liable to such condemnation.

I think in dealing with a question of this kind it is important to consider first principles, and they are nowhere discussed better than in a whole chapter in the "*Rationale of Judicial Evidence, specially applied to English Practice*," by Jeremy Bentham, who has been justly called the father of English jurisprudence, and upon whose writings are undoubtedly based the modern doctrines of judical evidence and trials, not only in England, but in the neighbouring countries of Europe. The chapter is the VIIth of Book III. in that celebrated work, and in dealing with the question whether the evidence should be collected by the same person by whom the decision is to be pronounced, shows the *pros* and *cons* of the matter, leaving the result, on the whole, to be that delay and expense in the disposal of litigation is a worse evil than that of having judgments pronounced by persons who have not themselves taken the whole oral evidence in the case. But it is almost unnecessary to refer to such an eminent authority who deals with first principles of jurisprudence, because Petheram, C. J., might have been referred to a Full Bench ruling of the Bombay High Court, in which the judgment of Couch, C. J., now one of the Lords of the Privy Council, was concurred in by the rest of the Court, and in which that learned Chief Justice expressed the view that there is "no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts being, as is well known, to the contrary." This was said in the case of *Naranbhai Vrijbhukandas* v. *Naroshankar Chandroshankar* (1), to which I shall have to refer again in the course of this judgment.

I make these observations with all the respect which is due to one who, till lately, occupied the position of Chief Justice of this Court; and I make them because the rest of the judgment in the ruling which I am now considering uses expressions which, I humbly think, are not clearly intelligible to the Mufassal Courts of this country, and which, speaking for myself, I can but faintly understand from the little that I may claim to know of English technical law. The learned Chief Justice said in his judgment that "the law nowhere says that the two hearings may be linked together and virtually made one." I frankly confess I find it

(1) 4 Bom. H. C. Rep., A. C. J., 98.

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difficult to understand what this sentence exactly means; for I am unable to realize that when there are two hearings what the *link* between them can be. The only way in which I can respectfully render this intelligible to myself, is to say that the learned Chief Justice, in delivering that judgment, was thinking of those technicalities of special pleading in English Common Law procedure which no longer find favour, even in the Courts of Justice in England, at least since Lord Selborne's Judicature Acts, amalgamating the jurisdiction of Courts of Equity with those of Common Law, were passed. The learned Chief Justice probably had in his mind trials by jury in civil cases—trials which have a historical origin of their own in England, and the principles of which on such points are wholly inapplicable to the administration of justice in British India. In cases of trials by jury, it is of course important that the whole evidence upon which the parties rely should be produced before the jury which has to deal with it, and it is only in this sense that I can understand what the learned Chief Justice meant when he referred to two hearings being "linked together and virtually made one." And I may respectfully and frankly say that in no other sense is the phrase intelligible to me. Yet that phrase is the turning point of the whole effect of the ruling; for it was upon that ground that the learned Chief Justice declared himself to be of opinion that the judgment and decree in that case were "*absolute nullities*," which opinion constituted the reasons for trial *de novo*.

But the learned Chief Justice went further, and in delivering his judgment, gave expression to views as to sound policy in such matters, and indicated the distinction which he drew between the duties of the Court of first instance and those of the Court of appeal, as to evidence not taken before the Court which deals with such evidence. He observed:—"I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon *materials which are not before him*. It may be said that these observations are applicable to the proceedings of an appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance who

had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence ; and it is obvious that such a course is not in accordance with the interests of justice."

Now because considerations of justice have been referred to in this passage, I feel it my duty, as the only native Judge presiding in this Court, to express, as respectfully as I can, a protest against any such assumption. The cases before the learned Chief Justice were more or less heavy first appeals, in which the parties had produced all the evidence that they had to produce, and neither party took the objection that because the Judge deciding it was not the Judge who took the evidence in the case, the trial was an absolute nullity. The contention was not urged in the grounds of appeal, and it could scarcely be either the interests of justice or of the parties that all the proceedings in the Court below should be declared an absolute nullity. The legal aspect of these observations I shall presently consider ; but I think I may, with propriety, say here that the parties are not likely to gain but lose by the delay and expense of new trials ordered in the manner in which they were done in those cases, on grounds which neither party made the subject of objection in the Court below or took before this Court as a ground of appeal.

A few days before I had the honour of coming to this Court as an officiating Puisne Judge, I held the substantive appointment of District Judge of Rae Bareli, in Oudh, which required me to act as the Judge of the Court of first instance in all the important litigations of that division. Two cases were then, in the ordinary course, put up before me, in which my predecessor, who had been officiating for me, had recorded the evidence of a considerable number of witnesses, and I should have proceeded with the trial of those suits but for the two rulings of Petheram, C. J., which have been reported. These rulings were cited to me as authorities for the proposition that I could not go on with the trial, but that I should—in the words of the learned Chief Justice —" fix a day and re-hear it from beginning to end ;" because the learned Chief Justice, who presided over the administration of

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justice in these Provinces, had declared that any judgment or decree by me would be a "nullity," unless I fixed another date for the trial, and gave the parties another opportunity of re-summoning their witnesses and having them re-examined before me. It was also urged before me that the depositions recorded by my predecessor could be made evidence only by being put in as documentary evidence containing the depositions of witnesses examined in a former trial which had proved *abortive*, and had become a *nullity*, and that if those depositions were not so put in, I could not refer to them, although they already existed upon the record which was then before me. Sitting there as the Judge of an inferior Court, I felt, out of respect, bound to accept this enunciation of the law, coming as it did from the Chief Justice of this Court; but I felt then, as I respectfully do now, that for me to regard the proceedings of my predecessor as "absolute nullities" would have been in those cases a pure waste of time, and cause unnecessary delay and expense to the parties. Yet, though not bound as a Judge in Oudh to accept the ruling of this Court upon all questions of this nature, I deferred to the eminent authority of Petheram, C. J., and resummoned the witnesses whose evidence had already been taken by the Court. I did so because of what the learned Chief Justice had said in the case of *Afzal-un-nissa Begam*: "The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, *became a nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him." Then my attention was called to another passage in the same learned judgment, which contains the conceptions of the learned Chief Justice as to the requirements of our law of Civil Procedure. After stating that the appointment of a new Judge had rendered all the proceedings taken by his predecessor a "*nullity*"—I suppose in the legal sense—the learned Chief Justice went on to indicate how that "*nullity*" might be cured, for the *nullity* having already occurred according to the former part of the judgment, it could, of course, not be avoided. I will quote the whole passage because it contains the latest enunciation of the law by so eminent a legal authority. The learned Chief Justice said:—

"The question then arises—What was the duty of Maulvi Zain-ul-abdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing; that is to say, for the *entire hearing* and trial of the case before him. He might, at the request of the pleaders, have *fixed the same day*, the 9th December, and proceeded to try the case *at once*. But by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way as if the day were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

With reference to this learned passage and the earlier portions of the judgment, it was suggested to me by one side of the Bar, in the cases which I had before me, that I should record an order, saying, in the words of the learned Chief Justice, that as "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was *abortive*, and, as a trial, *became* a *nullity*," it was my duty to "fix a day and re-hear it from *beginning* to *end*;" that in order to achieve this result I might "try the case at once" on the same day by fixing that very day, because, as the learned Chief Justice had said in the case before him, the new Judge, by "the act of fixing a date, would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard." And it was argued that these enunciations of the requirements of the law would be fully satisfied if, taking up the case at 11 A. M., I fixed the same day for the new trial to take place at five minutes after 11, and it was said that by this interpretation of the two learned rulings with which I had to deal, I might utilize all the

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proceedings which my predecessor had taken in the case, and proceed with the trial as I should otherwise have done. This is the manner in which these two learned rulings have been understood in the Mufassal, and so far as I am concerned, as I have respectfully said before, they leave but a vague and uncertain impression upon my mind as to the principles on which they exactly proceed. It would be almost a want of due respect to point out what constitutes a *nullity* in law, and that to speak of a trial which, "so far as it had gone, was abortive, and, as a trial, became a *nullity*," as capable of becoming anything other than a nullity, would be to violate the elementary principles of general jurisprudence and of English law itself. A "*nullity*" is a "*nullity*," and cannot become anything else either by the consent of the parties or by the desire of the Judge. The proposition is too clear to require any authorities, and out of respect for the learned Chief Justice, I cannot but hold that, in using the expression that the trial, so far as it had proceeded, had become a "*nullity*," he was not using the expression in the strictly legal sense in which it is understood in the English law itself.

Our Civil Procedure Code repudiates all technicalities of special pleading at one time so favoured by the English Common Law. And what is the method of trial which the principal sections of that Code indicate? I must answer these questions with special reference to such phrases as were used by Petheram, C. J., in the two reported rulings, to the effect that the new Judge had "fixed no date for the hearing of the case as for a *new trial*;" that "this was an *absolutely illegal* course and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code;" that the trial before the former Judge was an "*abortive*" trial; that "the law nowhere says that two hearings may be *linked* together and virtually made one;" and that the judgment and decrees passed on evidence recorded by his predecessor were therefore "*absolute nullities*." The last, of course, is an expression of strength and positiveness as to the exact rule of law laid down in those cases, and words to the same effect are repeated in the second reported case, which, it is contended, by lucidity of exposition, mitigates the rigour of the rule laid down in the first reported case.

Now, under the Civil Procedure Code (s. 48), a suit commences with a plaint, and thereupon follow certain processes for the

appearance of the parties and other subsidiary matters, such as the filing of written statements, the examination of the parties by the Court. S. 138 imperatively directs the parties to keep their documentary evidence in readiness "*at the first hearing*," which clearly means, as s. 146 indicates, the day on which the issues are settled. Then follows Chapter XII. of the Code, authorizing the Court, under certain conditions, to dispose of the suit at such first hearing. The next Chapter (XIII.) relates to adjournments of the hearing of the suit. Chapter XIV. lays down rules as to the summoning and attendance of witnesses, and then follows Chapter XV., to which Petheram, C. J., has attached so much importance, for, according to him, the trial begins at the stage when the examination of the witnesses is taken under that chapter. According to the learned Chief Justice, all proceedings taken by a Judge under that chapter are not available for his successor, because "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was *abortive*, and, as a trial, became a *nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him." The duty of the succeeding Judge under these circumstances would, according to Petheram, C. J, be to fix "a day for the *entire hearing* of the suit before himself," though, "at the request of the pleaders," he might fix "the same day," and proceed "to try the case at once." But if this technical formality is not gone through, the learned Chief Justice's reasoning is, that because by the removal of the preceding Judge, the trial, so far as it had gone before him, had become a "*nullity*," therefore the judgment and decrees passed by the succeeding Judge upon the result of such a nullity would themselves be "*absolute nullities*;" for, as the learned Chief Justice argues, "the law nowhere says that the two hearings may be *linked together* and virtually made one," but regards every second or subsequent hearing to be "a proceeding held by adjournment in the trial heard on the original date." These observations are in keeping with the observations made by the same learned Chief Justice in *Queen-Empress* v. *Pershad* (1), and, though they related to criminal procedure, throw light upon his way of regarding such matters of procedure. The learned Chief Justice observed :—

(1) I. L. R., 7 All. 414.

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"As I understand the law, a case is supposed to be tried on the day the trial commences, and after that day the case proceeds by adjournment. The only date to be looked at as the date of trial is the date of the first day of trial."

These observations may no doubt be sound English technical law, but no attempt was made to show that those technicalities had been imported into our law of procedure, and the rest of the Full Bench which heard that case, including myself, were unable to accept the learned Chief Justice's conclusions to be such as were warranted by our Criminal Procedure Code. Here the case is very analogous, for the *ratio decidendi* adopted by the learned Chief Justice upon this point, as to the trial dating from the original date, and as to what he calls the linking of hearings, is identical with the one to which the above quoted observations related.

The question then is, whether there is anything in the Civil Procedure Code to warrant the conclusion that the first, second or third hearing of a suit, held by a Judge having jurisdiction to hear it, ceases to be first, second or third hearing by the simple fact of another Judge having succeeded the one who had held those hearings. The learned Chief Justice has ruled that under such circumstances the trial, so far as it had gone, becomes a "*nullity*;" but I think I may respectfully say that there is nothing in the whole Code to justify such a conclusion. For what does the argument amount to? It amounts to saying that many hearings may have take place in the suit, and those hearings are perfectly valid up to the forenoon of a day when the Judge who held them may be still presiding in the Court; in the afternoon, when the succeeding Judge takes his seat, all those proceedings become *ipso facto* "*nullities*." Surely, express words in the Code itself are required to sustain this proposition; and upon general principles, which show that the identity of the Court does not change by the change of persons, I should say that very strong authority indeed is required to reduce that which is admittedly a valid proceeding, when taken, into a mere *nullity* by a circumstance which lies out of, and is foreign to, the proceeding itself. The learned counsel who argued this case before the Full Bench in support of

the appeal, confessed himself wholly unable to cite any authority, even of the English technical law, which would go to support this proposition, and I respectfully confess I am unable to accept it either as good law or sound jurisprudence. And I think this is the appropriate place for pointing out, as supporting my view, that our own Civil Procedure Code, wherever it attaches significance to the identity of individuals in the person of the Judge presiding in a Court, it expressly mentions it, obviously as an exception to the general principle of jurisprudence, that the identity of the Court is not altered by a new Judge being appointed. Of this a good illustration is afforded by s. 624 of the Code, which lays down that, except under certain conditions, no application for a review of judgment "shall be made to any Judge other than the Judge who delivered it." The Code says nowhere that a Judge shall not deliver a judgment upon evidence taken by his predecessor. On the contrary, the Code contains express provisions indicating that such a rule as to the identity of the Judge is not applicable to taking or recording of evidence in the course of civil trials.

This brings me to the most important point in the case, namely, the exact interpretation of s. 191 of the Civil Procedure Code.

It must, in the first place, be observed that the section occurs in Chapter XV of the Code, which lays down rules relating to the hearing of the suit and examination of witnesses. The first section of the chapter is 179, which lays down that "on the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." This section clearly shows that the "hearing of the suit" may take place either on the original day fixed for such hearing, or on any subsequent adjourned date; and I suppose no one would maintain that if the Judge before whom the case came on for hearing on the original date dies or is transferred, and the case then comes on for hearing before his successor on the adjourned date, it would be necessary for the new Judge to fix another date for the first hearing on the hypothesis of Petheram, C. J, that the trial must understood to have been "heard on the original date." Then comes s. 180, which relates to the statement of his case by the other party and the

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production by him of his evidence. S. 181 provides that witnesses should be examined in open Court, and the next section (182) lays down that "in cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence, and under the personal direction and superintendence, of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it." The next eight sections deal with minor details which need not be noticed, but they leave no doubt that the evidence of the witnesses so taken becomes part of the record. Then follows s. 191 itself, which lays down that "where the Judge taking down any evidence, or causing any memorandum to be made under this chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum *as if he himself had taken it down or caused it to be made.*"

Now, to use the language of Parke, B., in *Becke* v. *Smith* (1); "it is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." This, indeed, is one of the principles of what has been called the "*golden rule*" for the construction of statutes. It is as old as the time of Lord Coke; and Mr. Wilberforce in his useful work on *Statute Law* (pp. 112-115) has cited numerous cases to support the rule laid down by Parke, B. And applying that rule to the interpretation of s. 191 of the Civil Procedure Code, it may well be asked why the words which I have emphasized in quoting the section are not to be understood in the sense which they naturally convey. That those words clearly mean that the Judge pronouncing the judgment need not be the same as the Judge recording or taking the evidence,

(1) 2 M. and W. 195.

seems to me, so far as I can understand the English language, wholly beyond doubt. For if, in the two above-mentioned cases which I had before me at Rae Bareli, I could deal with the evidence taken and recorded by my predecessor, as if I myself had taken down or recorded such evidence, I fail to see why the trial, so far as it had gone before my predecessor, should have been treated by me as a "*nullity*."

It must be remembered that to put any interpretation other than the natural one upon s. 191 of the Code, it must be shown that such interpretation leads to a "manifest absurdity or repugnance to be collected from the statute itself." Parke, B., has said so in the case to which I have just referred, and his ruling being supported by numerous other authorities, I have looked in vain for any provision in the Civil Procedure Code which would show that the natural meaning of s. 191 is not to be adopted. Indeed, the "manifest absurdity or repugnance" seems to me to lie in interpreting that section in any sense other than that conveyed by the simple English words which I have emphasized in quoting that section. Nor do the judgments of Petheram, C.J., satisfy me that he discovered anything in the Code, which would justify the view that the evidence of witnesses taken down by a Judge cannot be dealt with by his successor as part of the record, and as if such successor himself had recorded such evidence. And I cannot help feeling with due respect that the learned Chief Justice, in delivering those judgments which have been reported as to the interpretation of s. 191 of the Code, was all along thinking of trials by jury in the English Courts of Common Law; and starting with the hypothesis that no rule of jurisprudence justified a Judge to pass judgment upon evidence not taken by himself, held that such judgment or decree must, *ipso facto*, be null and void, because "this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

That this view cannot be accepted, but is rather contradicted by the general principles of jurisdrudence, appears from what I have already said with reference to Jeremy Bentham and the *dictum* of Couch, C.J., which I have already quoted. And it will now

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be useful to examine whether our own Civil Procedure Code does not in itself contain many provisions which proceed upon the principle that the Judge taking the evidence need not, in all cases, be the same as the one who has to pronounce the judgment upon such evidence.

Now, in the first place, it appears to me clear that the whole system of first appeals provided by Chapter XLI proceeds upon the principle just enunciated; for it is obvious that the Judge presiding in the appellate Court has to decide questions of fact, both as to admissibility and weight of the evidence taken by the Judge of the Court below. Petheram, C J., in the case of *Jugram Das* (1), in drawing a distinction of principle, went on to say :—" It must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance, who had the evidence before him." But I respectively think that these observations seem to ignore some of the most important provisions of the Code relating to appeals, because the express words of s. 565 make it imperative upon the appellate Court to decide the case itself upon the evidence on the record, even though the judgment of the Court below may have proceeded solely upon a preliminary point (such as limitation, &c.), and have been wholly silent as to the weight of evidence. The section no doubt operates as throwing labour upon the appellate Court, but it has always been so understood as to prevent unnecessary remands of cases by the appellate Court. The case of *Banti Sublayya* v. *Madalapalli Subanna* (1) is only one of many other reported cases which go to support what I have said ; and the practice of this Court in first appeals has not been different in this respect, unless it has been altered during the last year. There is thus a clear instance of the Code requiring the appellate Judge to decide questions of fact upon evidence not taken by himself, and in regard to which evidence the Judge who took it has never expressed any opinion. Then again, apart from the provisions of s. 566, which contemplates a finding upon the remanded issue by the Judge taking the evidence, there are ss. 568 and 569, which lay down rules for the taking of additional evidence, and the latter section provides that :—" Whenever additional evidence is allowed to be received, the appellate Court may either take such evidence, or direct the

(1) I. L. R., 7 All. 857. (2) I. L. R., 3 Mad. 96.

Court against whose decree the appeal is made, or *any other subordinate Court*, to take such evidence; and to send it, when taken, to the appellate Court." The section does not contemplate any expression of opinion upon the evidence taken by such subordinate Court, and yet the appellate Court has to decide the case upon such evidence. S. 390, relating to the examination of witnesses by commission, is another illustration of the principle that the Judge deciding the case may found his judgment upon evidence not taken by himself; and I have failed to find any provision in the Civil Procedure Code which would justify the view that in all cases where a Judge passes a judgment and decree upon evidence taken by his predecessor, such judgment and decree are "*absolutely nullities.*"

This brings me back to s. 191 of the Code which I have already quoted. I have before now said, sitting as a Judge of this Court, that the general principles of Lord Coke's celebrated *dictum* in *Heydon's Case* are applicable to the interpretation of our own Indian enactments, and that in construing the rules of such departments of law as Civil Procedure, which has repeatedly been the subject of repealing, amending, and consolidating legislation, it is important to consider the previous state of the law, the mischief and defect which that law did not provide for, the remedy which the Legislature adopted to remove the mischief, the true reason of the remedy, and (to use Lord Coke's own words) "then the office of all the Judges is always to make such construction as will suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico.*"

I respectfully think that these principles of construction, which have never been doubted in England, but have passed almost into maxims of law, were not kept in view in the rulings which have necessitated this reference to the Full Bench. For whilst those cases afford no indication of any attempt being made to consider the previous state of the law, either as represented by the old Civil Procedure Code of 1859, or by the case-law upon the subject, the conclusions at which those rulings have arrived are, in my opinion,

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such as continue the mischief which s. 191 was clearly intended to remove, and that their practical effect is to encourage in the Mufassal what Lord Coke has called "subtle inventions and evasions for continuance of the mischief."

Now, the rule contained in s. 191 of the present Code was totally absent from the old Civil Procedure Code of 1859, and whilst that Code was in force considerable difficulty and doubt arose as to whether, in cases where a Judge had partly taken the evidence in a case, his successor was bound to recall and examine the witnesses *de novo*, as if the trial commenced anew. This is indicated by many cases to be found in the Reports, and the general effect of them may be stated to be that, under circumstances such as those contemplated by s. 191, the new Judge was bound by law to take the evidence *de novo*, unless the parties waived such right and assented to the evidence taken by the former Judge being dealt with as evidence taken by the new Judge. The same is the effect of two unreported rulings of this Court in *Shaikh Jalal-ud-din* v. *Damodar Das* (S. A. No. 972 of 1869, decided on 1st December, 1869), and *Nasir-ud-din* v. *Thakori* (S. A. No. 315 of 1869, decided on 31st May, 1869), to which Mr. *Colvin* has called our attention. So stood the law when the Code of 1877 was passed, and it was in s. 191 of that Code that the Legislature for the first time gave expression in explicit words to the rule which has been enunciated in s. 191 of the present Code, which I am now discussing. To say that the new section did not alter the law is to say that the new section was wholly a superfluous action on the part of the Legislature. But it seems to me impossible, upon a comparison of the state of the law antecedent to the Code of 1877, to hold any such view. There was clearly a mischief created by the difficulty and uncertainty which the words of the old Code did not remove, and it seems obvious that the new section aimed at suppressing the evil. Yet the effect of the two rulings of this Court, which I am now considering, is to interpret the law as if s. 191 of the Code had never been passed.

Indeed, the effect of those rulings is almost retrogressive, for whilst under the old law the action of a Judge, in pronouncing a judgment upon evidence taken by his predecessor, was regarded as an *irregularity*, capable of being cured by the assent of the parties, in the rulings which have given rise to this reference such action

has been denominated as a "*nullity*," which of course neither the consent of the parties nor the desire of the Judge can cure. Indeed, in the cases of *Malik Fakir Bakhsh* and *Afzal-un-nissa Begam* such consent was actually given in the Court below, and yet the trials were set aside as absolute nullities. I have already said with due respect that there is absolutely no warrant in the Civil Procedure Code to justify the view, and the learned counsel who appeared in support of that view confessed himself unable to cite any principle of jurisprudence or any rulings of the English or the Indian Courts which would even approximately support the rule which Petheram, C J, laid down in those cases.

On the contrary, even under the law as it stood under the Code of 1859, which, as I said before, contained no rule such as s. 191 of the present Code, we have the authority of a Full Bench ruling of the Bombay Court in *Naranbhai Vrijbhukandas* v. *Naroshankar Chandroshankar* (1), where four learned Judges concurred in the judgment of Couch, C J., from which I have already quoted a passage to show that there is no rule of jurisprudence which requires that the evidence of the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts is, as it well known, to the contrary. I will, however, at the risk of prolixity, quote further from that judgment, in order to make clear the distinction between a *nullity* and an *irregularity*, and to show that what Petheram, C.J, denominated as "*absolute nullities*" were regarded by Couch, C.J., and the four learned Judges who concurred with him, as mere *irregularity*, even when s. 191 did not exist as a rule of our law of procedure. Couch, C.J., observed :—

"The plaintiff has appealed to this Court, stating, as one of the grounds, that the suit has been illegally decided by a different Judge upon evidence recorded by the Principal Sadr Amin. Now, the evidence taken by the Principal Sadr Amin, even if taken in a former suit between the same parties, and not, as this was, in the same suit, would have been admissible as secondary evidence, if the witnesses had been incapable of being called ; and the use of it by the Munsif was, in my opinion, only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be again examined, and proceeding with the suit, and producing other

(1) 5 Bom. H. C. Rep., A. C. J. 93.

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witnesses to be examined in support of his claim. The plaintiff now asks this Court to reverse not only the decree of the District Court, which is against him, but also the decree of the Munsif, which was in his favour, and was founded on the evidence which he now contends was inadmissible. I think he is not entitled to this." The judgment then went on to consider the effect of s. 350 of the Code of 1859 (which corresponds to s. 578 of the present Code), and held that that section covered the irregularity, disentitling the appellant to obtain reversal of the decree of the Court below. And then the judgment went on to say as indicating the proper and sensible course to be adopted in such cases:—"Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower Courts, to prevent the necessity of re-summoning witnesses; but where a deposition taken by another Judge is read, instead of the witness being examined, I think it is only an irregularity, which may be waived by the parties, and which would not be a ground for reversing the decree on special appeal, unless it appeared that the appellant had been prejudiced by it."

These observations, as well as those which precede them, command the highest respect from the Indian tribunals, because they proceed from an eminent Judge, who, after having acted as a Puisne Judge of the Bombay Court, was made Chief Justice of that same Court, and afterwards became Chief Justice of the High Court of Bengal, and is now one of the Lords of the Privy Council. And I am bound to say that I accept the authority of such an eminent Judge, though it is wholly inconsistent with the rulings which have regulated the practice of this Court during the last year in connection with such cases. For I find that in every one of those cases the parties had never objected to the action of the Judge in the Court below as to his reading the evidence recorded by his predecessor, nor was the question urged in the grounds of appeal. So that it could only have been by the exceptional exercise of power granted by s. 542 of the Code that Petheram, C.J., decided those cases upon grounds which were never taken in the memorandum of appeal before him, and which never formed the subject of objection in the Court below.

Now, there is another aspect of the matter, namely, the one to which Couch, C J., referred, and which is now regulated by s. 33 of the Evidence Act. That section lays down that evidence taken in a former judicial proceeding or "in a later stage of the same judicial proceeding" may, under certain conditions, be admitted in evidence. And Couch, C.J., has pointed out that where such conditions are not fully satisfied, the admission of such evidence does not amount to a "*nullity*," but only to an "*irregularity*." He further points out, relying upon the practice of the English Courts as indicated in s. 1681 of Taylor's celebrated work on Evidence, that where evidence is allowed by a party without objection to be used in a trial, such party "would not be at liberty afterwards to object to its being used, or obtain a new trial on that ground, even if the original decree had been against him." In the cases before Petheram, C. J., the parties evidently raised no such objection in the Court below, and indeed they did not raise it here in their grounds of appeal.

Again, even if it be granted for a moment that, notwithstanding s. 191 of the present Code, the manner in which the succeeding Judge dealt with the evidence taken by his predecessor amounted to an irregularity, there was surely no authority to declare the whole trial as a *nullity*, and to remand those cases for trials *de novo*. No attempt appears to have been made to consider whether s. 578 of the Civil Procedure Code affected the question. The terms of that section are imperative, and it lays down that "no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court." To a similar effect are the terms of s. 167 of the Evidence Act, which prohibits, in express language, new trials being ordered for rejection or improper reception of evidence.

But if I am right, following the view of Couch, C.J., in thinking that the action of the Court below in the case before Petheram, C. J., could at its best be regarded as an *irregularity*, it may well be asked where the authority was for setting aside the decrees in

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those cases and remanding them for trial *de novo*. S. 562 of the Civil Procedure Code is the only authority available to the first appellate Court for such an action, and that section was clearly inapplicable to all those cases. Then there were also the provisions of ss. 564 and 565, giving clear indications of the policy of the law that the delay and expense of new trials must, as far as possible, be avoided; but those sections do not seem to have been either cited or considered in the rulings which have given rise to this reference. And I think I may here say, with profound respect, that those rulings can be understood only as proceeding upon technicalities foreign to our Civil Procedure Code, and which, so far as I can understand the exigencies of the administration of justice in India, are not calculated to promote either the interests of the parties or the interests of justice. For, to use the words of Lord Penzance in *Combe* v. *Edwards* (1) "the spirit of justice does not reside in formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice; and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque."

I now proceed to consider whether the present case is in any manner distinguishable from the rulings to which I have referred at such length, and in order to answer this question, I have examined the records of those cases In the unreported case of *Malik Fakir Bakhsh* v. *Chauharja Bakhsh Singh* (F.A. No. 88 of 1884, decided on 7th July, 1885), I find that the parties had—to use the words of Petheram, C.J.—"given a sort of consent to the adoption of this course;" that is, the course which induced the learned Chief Justice to hold "that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his file and try it according to law." Again, in the case of *Afzal-un-nissa Begam* v. *Al Ali* (2), which is supposed to have mitigated the rigour of the rule laid down in the earlier case of *Jagram Das* v. *Narain Lal* (3), I find that the Subordinate Judge, whose judgment was treated as a *nullity*, necessitating a trial *de novo*, had,

(1) L. R., 3 P. D. 103. (2) *Ante*, p. 35.
(3) I. L. R., 7 All. 857.

before recording his judgment, expressly put down upon the record the following observations :—

"I found this case complete in every way; the evidence on both sides has already been filed. I therefore proceed to try the case, *as requested by the pleaders for the parties*, on the existing evidence, *after hearing the arguments on both sides*, and perusing all the papers on the record and the evidence produced by both parties."

These observations appears at page 11 of the printed English record which was before Petheram, C.J., and they are important as furnishing reasons for realizing the length to which the ruling in that case has gone. In the present case the facts are exactly similar, and indeed not so strong as they were in the case just referred to. What happened here was that the suit was filed on the 31st March, 1883, written statement in defence was filed and issues were framed on the 15th January, 1884, one witness was examined on the 18th and 19th of the same month, and the case was postponed to the 22nd of the same month. On that day another witness was examined, and the examination of other witneses continued up to the 29th of that month, when the defendants applied for proceedings being taken, under s. 170 of the Civil Procedure Code, against a witness, and the 12th February, 1884, was fixed for further hearing of the case. Upon that day the witness in question did not appear, and the 3rd March, 1884, was fixed, and the case coming on for hearing on that day, some more witnesses were examined, and the Subordinate Judge then recorded an order saying—"As this case is complete, it is ordered that the 14th March, 1884, be fixed for hearing arguments. Pleaders to be informed." The Subordinate Judge who made this order (Babu Ram Kali Chaudhri) then ceased to be the Judge of the Court, and was succeeded by another Judge (Babu Abinash Chandar Banarji), who on the 10th May, 1884, recorded the following proceeding :—

"In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and as he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and 13th May, 1884, be fixed for decision."

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Upon the day so fixed another proceeding was recorded, referring to the witness who had not appeared in Court, and the case came on for hearing on two more occasions; and on the 24th June, 1884, the judgment was delivered by the Judge after the final hearing of the case, which, according to the Mufassal practice, of course, includes the hearing of the arguments of the parties or their pleaders.

No objection of any sort appears to have been raised in the Court of first instance to the course which the Judge of that Court adopted, nor was the question urged as a ground of appeal before the lower appellate Court. Indeed, for the first time in this Court it is argued, upon the authority of the two reported cases to which I have already referred, that the judgment in this case must be treated as a nullity.

I cannot help holding that the circumstances of this case are not distinguishable in principle either from the unreported case of *Malik Fakir Bakhsh* or from the reported case of *Afzal-un-nissa Begam*, (1) in which the previous ruling in the case of *Jagram Das* (2) was followed. And further, I hold that if in those cases the judgments and decrees of the Courts below were nullities, as was there held, the judgments and decrees in this case are also nullities *a fortiori*. But I have already stated the reasons why I am unable to accept the rule of law laid down in those cases, and I must, with reference to the various points already enumerated by me as the effect of the rulings which have given rise to this reference, now summarize the view which I take of the law under the present Civil Procedure Code. As I understand that Code, I hold—

(i)—that although it is true that "a trial must be one and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court;

(ii)—that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a "trial heard on the original date;"

(iii)—that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor,

(1) *Ante*, p. 35. (2) I. L. R., 7 All. 857.

and to continue it from the point at which his predecessor left off;

(iv)—that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity;

(v)—that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself;

(vi)—that the Code does not recognise such procedure as amounting to separate trials;

(vii)—that the Judge who succeeds another after a trial which has partly proceeded before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing;

(viii)—that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is, *ipso facto*, evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;"

(ix)—that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record;

(x)—that such depositions must be dealt with as materials of evidence before the new Judge;

(xi)—that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction;

(xii)—that when such judgment and decree are passed, the Court of first appeal is prohibited, by s. 564 of the Code, to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence in the record;

(xiii)—that where further issues are required to be tried, or additional evidence is to be taken, the Court of appeal is bound

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to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial;

(xiv)—that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Such being my view of the law as it now stands, I hold, with due respect for the rulings which have given rise to this reference, that in none of those cases could a new trial be ordered. And I think I must say that I have regarded it my duty to deal with this matter at such elaborate length, partly because I understand that the Legislature is contemplating the amendment of the Civil Procedure Code, but mainly because I have very little doubt that the two reported rulings of Petheram, C. J., which I have had to consider at such length, have practically resulted in retarding the administration of justice in all parts of India where those rulings are respected, as they were by me at Rae Bareli in Oudh. Indeed, the very cases in which those judgments were passed afford good illustrations of what I have just said. For example, in the case of *Mulik Fakir Bakhsh*, the litigation began on the 18th March, 1882, in the Court of the Subordinate Judge of Allahabad; proceedings in the case were taken by two or three Subordinate Judges in the Court of first instance; the litigation did not come to an end in that Court till the 24th December, 1883, and the order of Petheram, C.J., in this Court, on the 7th of July, 1885, declared that all that had taken place in the Court of first instance "must be treated as a *nullity*." Similar were the facts in the case of *Afzal-un-nissa Begam* and the other cases, and I cannot help feeling that such a view of the the law, though it may tend to reduce the labour of the appellate Court in dealing with cases which have been pending in the Court of first instance for a lengthened period and in which more than one Judge has taken the evidence, is not calculated to reduce either the expense or the dilatoriness of litigation. And I think I may add that if my view of the law, as it now stands, is inaccurate, the Legislature, in considering the amendment of the Civil

Procedure Code, might consider the principal results of the rulings from which I have ventured to differ, and which have tended to throw back the administration of justice in this part of the country, wherever, by death or transfer, new judicial officers have been appointed.

I have no hesitation in answering the question referred to the Full Bench in the affirmative.

TYRRELL, J.—The order of reference is as follows:—

"In this case, which has been taken up as bringing forward in a more cogent form the question referred in F. A. No. 52 of 1885, we refer the following question to the Full Bench:—Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of first instance, that Court or the officer presiding therein who passed the decree had jurisdiction to deal with and determine the suit in the mode in which he did. This reference has been made for the special purpose of considering the effect of two judgments of this Court, reported in I. L. R., 7 All. 857, and I. L. R., 8 All. 35."

My learned brother Oldfield, in his answer to the former portion of the reference, has given a precise and succinct exposition of the law laid down by Sir Comer Petheram on the procedure to be followed in the trial of a suit or appeal, when the Judge who began the hearing is removed from the Court before the conclusion of the suit or appeal. I fully concur in that exposition and in its application to the second appeal referred to us. And I am of opinion that the question relating to this second appeal, which is a pending case in our Court, is the only matter we can legally attend to in this reference. We are not competent, I think, to review or pronounce judicial opinions on our judgments in cases finally decided by us, unless they are brought before us by or on behalf of the parties in any of the modes provided by the law. It would be certainly unprecedented on our part to review or consider our judgments behind the backs of the parties at the invitation only of some of ourselves.

It was for this reason that at our sitting in Full Bench in regard to the Second Appeal No. 1155 of 1885 we abstained from going

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into the latter or subsidiary part of the order of reference. I am unable therefore to follow my learned brother Mahmood into his discussion of this Court's judgments given in cases not the subject of this reference. Bnt perhaps it may not be irregular to remark, with reference only to the literary aspect of his criticisms on the phraseology used by Sir Comer Petheram and me in those judgments, that when we said that the Court in question "had not jurisdiction" to follow the procedure we disapproved, and therefore its proceedings were "null," we meant and said the same as my learned brother Mahmood recently did when he annulled the trial of a first appeal, and remanded the case for new trial, because the Judge, having unquestionable jurisdiction in the case, had omitted to formulate his judgment in the mode required by s. 574 of the Civil Procedure Code [*Mahadeo Prasad* v. *Sarju Prasad* (1)]. The proceedings were treated as null and void, the judgment and decree were pronounced "illegal," and a new trial in first appeal was ordered. We did the same in our cases and in similar language, but for different irregularities. In all the cases alike—in those remanded by us and in that remanded by my learned brother Mahmood—the Courts had unquestionable jurisdiction, but they had not jurisdiction, that is to say power, in the popular use of the phrase, to try them and decide them as they did.

1886 *May* 22.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DHARUP NATH (DEFENDANT) *v.* GOBIND SARAN (PLAINTIFF).

GOBIND SARAN (PLAINTIFF) *v.* DHARUP NATH (DEFENDANT).*

Hindu Law—Daughter's son—Missing person—Act I of 1872 (*Evidence Act*), *ss.* 107, 108.

Ss. 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

* Second Appeals Nos. 1622 and 1750 of 1885, from decrees of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 26th May, 1885, modifying decrees of Munshi Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 22nd December, 1884.

(1) Weekly Notes, 1886, p. 171.

In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son.

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

Held that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed.

Mazhar Ali v. *Budh Singh* (1), *Janmajay Mazumdar* v. *Keshab Lal Ghose* (2), *Guru Das Nag* v. *Matilal Nag* (3), and *Parmeshar Rai* v. *Bisheshar Singh* (4) referred to.

ON the 10th October, 1882, Musammat Sheo Kuaria, the surviving widow of one Hanuman Dat, died. On the 24th December, 1882, Gopal Saran, the daughter's son of Hanuman Dat, sold certain landed property to the plaintiff, to which he alleged himself to be entitled as the sole heir of Hanuman Dat. The plaintiff's claim to possession of the property was resisted by Dharup Nath, the son of Gobind Saran, Gopal Saran's brother, and daughter's son of Hanuman Dat, and the plaintiff accordingly sued him for possession. The defendant defended the suit as to a portion of the property, on the ground that it had, on the death of Sheo Kuaria, descended on his father and Gopal Saran, the plaintiff's vendor, jointly, and Gopal Saran was not competent to alienate it; and as to the rest, that it formed no portion of Hanuman Dat's estate, and Gopal Saran had no title to it.

(1) I. L. R., 7 All. 207.
(2) 2 B. L. R., A. C., 134.
(3) 6 B. L. R., Ap. 16.
(4) I. L. R., 1 All. 53.

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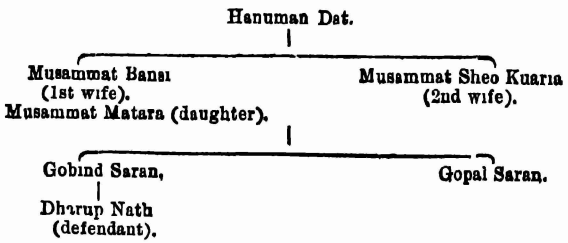
It appeared that Gobind Saran, the defendant's father, was missing. The plaintiff alleged that Gobind Saran had not been heard of for seven years prior to the death of Sheo Kuaria, and contended that it must be presumed that at that time he was dead. The defendant alleged that his father had been heard of within that period, and contended that the presumption relied on by the plaintiff did not arise.

The Court of first instance (Subordinate Judge of Gorakhpur) held that it was proved that the defendant's father had not been heard of for seven years prior to the death of Sheo Kuaria, and it must be presumed that he was dead at the date of her decease; and it gave the plaintiff a decree as claimed. On appeal by the defendant the lower appellate Court (District Judge of Gorakhpur) affirmed the decree of the Court of first instance, except as regards the property which the defendant contended did not form part of the estate of Hanuman Dat. As to this property the Court held that it did not form part of that estate, and dismissed the plaintiff's claim. The plaintiff and defendant both preferred second appeals to the High Court, the defendant's appeal being numbered 1622, and the plaintiff's 1750, of 1885.

Mr. *J. Simeon*, for the defendant.

Lala *Lalta Prasad*, for the plaintiff.

MAHMOOD, J.—These two connected appeals, numbered 1622 and 1750 of 1885, can be disposed of together, as they arise out of one and the same decree and suit; and the following pedigree shows the relative position of persons whose rights have to be considered in this case:—



Hanuman Dat had two wives, one of whom was Musammat Bansi, who gave birth to Matara, a daughter, who had two sons,

Gobind Saran and Gopal Saran. Gobind Saran had a son named Dharup Nath, who is the defendant in the suit.

The property in suit to which S. A. No. 1622 relates has been found to have formed the estate of Hanuman Dat, and upon his death without a son, it would, by the usual course of Hindu law, devolve upon his two widows, who would take together as a single heir with the right of survivorship, and no part of the estate would pass to any more distant relation till both were dead. This is shown by Mr. Mayne in s. 468 (2nd ed.) of his work on Hindu law, where he has cited numerous authorities in support of the proposition. And it has been found in this case that, after the death of Musammat Bansi, the other widow, Musammat Sheo Kuaria, came into sole possession of the property, and continued as such till 10th October, 1882, when she died. The main question in this case is—On whom did the property devolve upon the death of Musammat Sheo Kuaria?

It is a principle of Hindu law, as Mr. Mayne has stated in s. 422 (2nd ed.) of his work, that "the right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot, under any circumstances, remain in abeyance. And the rightful heir is the person who is himself the next of kin at that time. No one can claim through or under any other person who has not himself taken, nor is he disentitled because his ancestor could not have claimed. For instance, under certain circumstances a daughter's son would be heir, and would transmit the whole estate to his issue. But if he died before his grandfather, his son would never take."

One of the sons of Musammat Matara, namely, Gopal Saran, was alive at the time of Musammat Sheo Kuaria's death in October, 1882; but his brother, Gobind Saran, father of the defendant, was admittedly missing; and it has been found by the learned Judge of the lower appellate Court that neither the brother nor the son of Gobind, nor any one else, had heard of him ever since he left home fifteen years ago; and the learned Judge has fortified this conclusion by the fact that on the 24th February, 1882, the defendant Dharup Nath himself stated on oath that his father Gobind had gone away ten years before, and had not since been heard of. And upon this state of things the learned Judge, applying the provisions

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of ss. 107 and 108 of the Evidence Act (I of 1872), held that the missing Gobind Saran, father of the defendant, could not be regarded as having been alive at the time of Musammat Sheo Kuaria's death in 1882, and that the whole estate which she held by inheritance from her husband Hanuman Dat, devolved entirely upon Gopal Saran, to the exclusion of the defendant Dharup Nath.

Now, upon these findings of fact, which we are bound to accept in second appeal, the first point which has to be considered is, whether the provisions of ss. 107 and 108 of the Evidence Act are applicable to the present case with reference to the missing Gobind Saran. The learned Judge has applied those sections to this case by parity of reasoning deduced from the Full Bench ruling of this Court in *Mazhar Ali* v. *Budh Singh* (1), where it was held that the rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable. That ruling would not by itself be applicable to this case, which is governed by Hindu law, though the principle laid down in that case would apply, if the question of the death of a missing person is simply a question of evidence and not of succession. In the case of *Janmajay Mazumdar* v. *Keshab Lal Ghose* (2), it was held by the High Court of Calcutta that when a Hindu disappears and is not heard of for a length of time, no person can succeed to his property as heir until the expiry of twelve years from the date on which he was last heard of; and a similar rule appears to have been adopted by the same Court in *Guru Das Nag* v. *Matilal Nag* (3). But both these rulings are antecedent to the Evidence Act which now regulates all questions of evidence; and the ruling which seems to come nearer to the present case than either of the other two cases is the Full Bench ruling of this Court in *Parmeshar Rai* v. *Bisheshar Singh* (4), where it was held that in a suit by a reversioner next after a missing reversioner the death of such missing reversioner might, for the purposes of such a suit, be presumed under the provisions of s. 108 of the Evidence Act, though the learned Judges

(1) I. L. R., 7 All. 297.
(2) 2 B. L. R., A. C., 134.
(3) 6 B. L. R., Ap. 16.
(4) I. L. R., 1 All. 53.

doubted whether, in a suit for the purpose of administering the estate of a missing Hindu, the rule contained in the above-mentioned section of the Evidence Act would be applicable.

In the present case the learned pleader who has appeared in support of the appeal, has made no attempt to show that the rule which I am now considering is regarded by the authorities of Hindu law as a rule of succession and inheritance, to which the provisions of s. 24 of the Civil Courts Act (VI of 1871) would be applicable; and under such circumstances I must hold that the question, whether the missing Gobind Saran was alive in 1882, at the time of Musammat Sheo Kuaria's death, is a simple question of evidence governed by ss. 107 and 108 of the Evidence Act; specially as the question in this case does not relate to the admitted property of the missing Gobind Saran; but the point is, whether Gobind Saran was alive at the death of Musammat Sheo Kuaria, so as to inherit any portion of the estate of his maternal grandfather after the death of the widow.

Now, ss. 107 and 108 of the Evidence Act may be read together, because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. The sections are thus worded :—

"When the question is, whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." The rule so enunciated has obviously been borrowed, with hardly any modification, from the English law of evidence as stated in Taylor's celebrated work (s. 157, 2nd ed.), from which I may quote the following passage :—"In such case, after the lapse of *seven years*, the presumption of life ceases, and the burden of proof is devolved on the other party. This period was inserted, upon great deliberation, in the statutes respecting bigamy, and the statute concerning leases for lives, and has since been adopted, by analogy, in other cases. But although a person who has not been heard of for seven

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years is presumed *to be dead*, the law raises no presumption as to the *time* of his death; and therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the presumption of the continuance of life."

I am prepared to accept this as a good explanation of the rule contained in ss. 107 and 108 of the Evidence Act, and I do not think that those sections, taken together, lay down any rule as to the *exact time* of the death of a missing person. So that whenever the question as to the *exact time* of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. In the present case the Court of first instance, upon the evidence before it, found that "the plaintiff's witnesses fully prove that he (Gobind Saran) has not been heard of for fifteen years," and the Court went on to discredit the allegation of the defendant that his father disappeared only ten years ago. This finding, as I have already said, was accepted by the lower appellate Court as justified by the evidence and circumstances of the case; and that Court found that the missing Gobind Saran was dead at the time when, by the death of Musammat Sheo Kuaria in 1882, the estate of her deceased husband, Hanuman Dat, would devolve upon his daughter's sons, the widow's estate having then terminated.

I accept this finding, which I regard as one of fact and not open to any objection, on the ground of illegality or irregularity, and I take it that Gobind Saran was not alive when Musammat Sheo Kuaria died on the 10th October, 1882. This being so, Gopal Saran was the only daughter's son of Hanuman Dat upon whom the estate of his maternal grandfather would devolve, to the exclusion of the defendant. The Hindu law upon the subject seems to me to be perfectly clear; and I may refer to ss. 477-479 (2nd ed) of Mr. Mayne's valuable work as enunciating the principles upon which a daughter's son inherits the property of his maternal grandfather. What is regarded in Hindu law as *woman's estate* is described by Mr. Mayne in ss. 536 and 537 of his work, and the nature of such estate is applicable alike to a widow and a daughter, both

being a sort of *life-tenant*—a phrase which I use only by way of analogy. In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates. And I may here quote a passage from s. 479 (2nd ed.) of Mr. Mayne's work, which, in principle, is fully applicable to the rights of the defendant Dharup Nath; for even his father Gobind Saran's right of inheritance could not initiate till after the death of not only the widows of Hanuman Dat, but also of any daughters, if such were in existence at the time of the death of the widow Sheo Kuaria. Mr. Mayne says—

"A daughter's son, on whom the inheritance has once actually fallen, takes it as full owner, and thereupon he becomes a new stock of descent, and on his death the succession passes to his heir, and not back again to the heir of his grandfather. But until the death of the last daughter capable of being an heiress, he takes no interest whatever, and therefore can transmit none. Therefore, if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belongs to a completely different family, and he would offer no oblation to the maternal grandfather of his own father."

This passage, which is fully supported by authority, shows that the death of a daughter's son, antecedent to the death of a daughter, would prevent the estate from devolving upon the son of such daughter's son; and this rule applies *á fortiori* to a case such as the present, where Gobind Saran, the father of the defendant, namely, the grandson of Hanuman Dat, has been found to have died before the death of Hanuman Dat's second widow, Musammat Sheo Kuaria. Gopal Saran was therefore the only existing son of a daughter of Hanuman Dat when the latter's widow, Sheo Kuaria, died in 1882; and upon this state of things, I have no doubt that the whole estate of Hanuman Dat devolved, upon the death of the widow, on Gopal Saran. But Gopal Saran, by a deed of sale of the 24th December, 1882, conveyed his rights and interests in the estate of his maternal grandfather to the plaintiff-respondent, and that deed has been found by the lower Courts below to have been genuine and valid,—a finding which we cannot

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disturb in second appeal. And this being so, the plaintiff is entitled to all that his vendor conveyed to him, and for these reasons I would dismiss this appeal No. 1622 with costs.

The cross-appeal No. 1750 of 1885 relates to the property which has been found, as a question of fact, by the lower appellate Court not to have belonged to the estate of Hanuman Dat; and that being so, it could not devolve upon the plaintiff's vendor, Gopal Saran, and the latter had no title to convey. The finding being one of fact, cannot be disturbed in second appeal, being open to no legal objection, and for this reason I would also dismiss the plaintiff's appeal No. 1750 with costs.

BRODHURST, J.—I concur in dismissing these two appeals with costs.

Appeals dismissed.

1886
June 26.

APPELLATE CRIMINAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* MOHAN.

Murder— Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 *(Penal Code), ss* 300, *Exception* 1, 302, 304.

Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep, stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

Held that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of s 300, *Exception* 1 of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder.

Queen-Empress v. *Damarua* (1) distinguished by STRAIGHT, OFFG. C. J.

THIS was an appeal from a judgment and order of Mr. H. P. Mulock, Sessions Judge of Sháhjahánpur, dated the 4th January, 1886, convicting the appellant of murder and sentencing him to transportation for life. The facts of this case are stated in the judgment of Brodhurst, J.

The appellant was not represented.

(1) Weekly Notes, 1885, p. 197.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

BRODHURST, J.—The prisoner, Mohan, was committed to the Sessions on alternate charges under ss. 302 and 304 of the Indian Penal Code; that is, for the offences of murder and culpable homicide not amounting to murder. The assessors, for reasons stated by them, were of opinion that Mohan was guilty of culpable homicide not amounting to murder. The Sessions Judge convicted Mohan of the offence of murder, and sentenced him to transportation for life. From this conviction and sentence Mohan preferred an appeal which came before me for disposal, and I referred it to a Bench of two Judges for consideration of two points of law; first, whether the confession of the accused before the Assistant Magistrate was, owing to certain defects in recording it, inadmissible in evidence; secondly, whether the offence committed was murder or culpable homicide not amounting to murder. The case then came before the Officiating Chief Justice and myself, and we remanded it for certain evidence under s. 533 of the Criminal Procedure Code. That evidence has now been received, the confession is duly proved, and is, I consider, true. The second point of law remains to be disposed of.

The facts of this case are briefly as follows:—

The accused suspected that his wife had, during his absence, formed a criminal intimacy with one Fakruddin, and the latter person has admitted that the accused's suspicions were well-founded. It appears that on the night in question the deceased woman, thinking that her husband was asleep, stealthily left his side with the intention of going to her paramour; that the accused took up an axe and followed her, found her in conversation with Fakruddin, and immediately killed her. Fakruddin meanwhile had run away to the room he occupied in his employer's compound; the accused followed him there, entered the room, and struck him, but without seriously injuring him. Fakruddin effected his escape from the room, and the accused then fastened the door and made a desperate attempt on his own life by cutting his throat. Two of the assessors were of opinion that accused found his wife in the act of criminal intercourse with Fakruddin. Were that proved, Mohan's offence would be reduced to culpable homicide not amount-

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ing to murder, but even Mohan did not in his confession urge as much in his own favour. He alleged that he had reason to believe that his wife had an intrigue with Fakruddin, that seeing her stealthily leave his bed at night, he armed himself, followed her, and found her sitting and conversing with Fakruddin, and he therefore immediately killed her. I have now had the advantage of consulting the learned Officiating Chief Justice and of referring to certain English and American cases bearing on this point of law.

In "Bishop's Commentaries on the Criminal Law," Vol. II, 6th ed. p. 711, is the following :—"A man suspecting adultery followed his wife, and found her talking with her paramour; she ran off, but the latter remained. He fell on him with a stone and knife, inflicting wounds which produced death, and it was held that the offence was murder—*The State* v. *Avery*, 64 N. C. 608;" and in *Kelly's Case* referred to on page 786, Vol. I, 4th ed., "Russell on Crimes and Misdemeanours," Rolfe, B., in summing up, observed :—"It is said that if a man find his wife in the act of committing adultery and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder; and if I were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be most grievously swerving from our duty." I am now satisfied that Mohan is guilty of murder, and I concur in dismissing his appeal.

At the same time I think that, with reference to the circumstances of the case, transportation for life is too severe a sentence. Natives of this country, in cases of this description, appear to be generally unable to exercise that control over themselves that Europeans usually succeed in doing. The prisoner, moreover, is an ignorant man, and, in my opinion, he received provocation, though not such as to bring his case within *Exception* I, s. 300 of the Indian Penal Code. I therefore concur with the learned Chief Justice

in recommending that his sentence be commuted to ten years' rigorous imprisonment.

STRAIGHT, Offg. C. J.—I have had an opportunity of reading the observations of my brother Brodhurst in reference to the case of this appellant, and it is unnecessary for me to recapitulate the facts which are clearly and fully set out in his judgment. I entirely approve of the order he proposes, and from the moment that I had an opportunity of perusing the evidence against the appellant, I never entertained any doubt that the Judge of Shâhjahânpur was right in law in the view he took as to the legal quality of the act committed by the appellant. That act was most undoubtedly one that constituted the crime of murder, and I think that had the learned Judge countenanced the view that, looking to the facts, there was enough by reason of grave and sudden provocation, to reduce the offence to that of culpable homicide not amounting to murder, he would have been improperly construing and applying the law applicable to such cases. I have already, in the case of *Damarua* (1), gone to the extreme limit that I am prepared to go in cases of this description, in holding upon the facts there disclosed, that the husband's offence in killing his wife or her paramour, or both, was, by reason of grave and sudden provocation, reduced from murder to manslaughter. In that case the circumstances were of such a character and description that there were reasonable grounds for the accused man believing or imagining that an act of adultery had been committed immediately before he saw his wife with her paramour; and I therefore, though not without doubt and with some elasticity, applied the principle which has been sanctioned in cases of this description by the rulings of the most eminent English Judges. In the present instance, none of those circumstances exist. On the contrary, it is clear that the appellant, having first armed himself with a weapon, followed his wife some distance, and all that he saw taking place before his attack upon her, was a meeting between her and the man with whom she had had improper relations, and some conversation passing between them. That state of things was wholly inadequate to the resentment with which it was met on the part of the appellant, and his act was altogether out of proportion

(1) Weekly Notes, 1885, p. 197.

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to the provocation given. The law does not sanction or approve a man taking into his own hands the duty of punishing his wife in the mode adopted by the prisoner, and it would be most dangerous to society if the Courts of this country were to adopt the doctrine that he might. "No man under the protection of the law is to be the avenger of his own wrongs. If they are of the nature for which the laws of society will give him an adequate remedy, thither he ought to resort"—"Russell on Crimes and Misdemeanours," Vol. I, 4th ed. p. 725. The conduct of the deceased woman in meeting her paramour was no doubt most improper; but the meeting took place in a public place and under circumstances that, while they might arouse the appellant's anger, they cannot be regarded of such a character that they can properly be held to have deprived him of his self-control to the extent and degree required by the law, before the nature of his crime can be reduced from murder to culpable homicide.

I approve of the order of my brother Brodhurst that this appeal should be dismissed, and I also agree in the recommendation that he proposes. While it is essential that in cases of this kind the true legal nature of the act, of which the person has been guilty, should be recorded against him, the question of punishment may, I think, with propriety, be brought to the notice of His Honor the Lieutenant-Governor, in whose hands resides the exercise of the prerogative of mercy. I agree with my brother Brodhurst that there are circumstances in this case which show it to be of a somewhat exceptional character, and I therefore concur in his recommendation.

Appeal dismissed.

1886
August 2.

APPELLATE CIVIL.

Before Mr Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

BAHORI LAL (APPELLANT) *v.* GAURI SAHAI (RESPONDENT).*

Civil Procedure Code, ss, 244 (c), 278-283—Question for Court executing decree—Separate suit—"Representative" of judgment debtor.

The decree holder under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of

* First Appeal No. 112 of 1886, from an order of Mirza Abid Ali Khan, Subordinate Judge of Shâhjahânpur, dated the 7th December, 1885.

certain shares, one of which was recorded in the *khewat* in the name of *K*, and two others in the name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L* as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objections she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L's* claim, as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to *L's* bringing a suit to establish his right. On the other side, it was contended that, *L* being the representative of the deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie.

Held that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L's* claim which was rejected by it was nothing more than to come in as *B's* representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution-proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution-proceedings.

Wahed Ali v. *Jumaee* (1), *Ram Ghulam* v. *Hazaru Kuar* (2), *Sita Ram* v. *Bhagwan Das* (3), *Shankar Dial* v. *Amir Haidar* (4), *Nath Mal Das* v. *Tajammul Husain* (5), and *Kanai Lal Khan* v. *Sashi Bhuson Biswas* (6), referred to.

THE facts of this case are stated in the judgment of Straight, Offg. C. J.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellant.

Mr. *Carapiet*, for the respondent.

STRAIGHT, Offg. C. J.—In order to make the questions that have been raised in this appeal intelligible, it is necessary to state the

(1) 11 B. L. R., 149.
(2) I. L. R., 7 All. 547.
(3) I. L. R., 7 All. 733.
(4) I. L. R., 2 All. 752.
(5) I. L. R. 7 All. 36.
(6) I. L. R., 6 Calc. 777.

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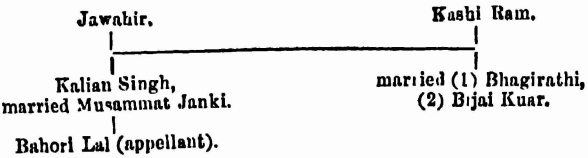
BAHORI LAL v. GAURI SAHA

following facts, and the accompanying table may facilitate the doing so :—



On the 2nd January, 1875, Kalian Singh executed a bond in favour of Gauri Sahai, respondent, hypothecating his zamindari rights and interests in mauza Deva Kanchan. He was at that time recorded in the *khewat* as proprietor of a 5 biswas share in that mauza, and Musammats Bhagirathi and Bijai Kuar, the widows of his deceased uncle, Kashi Ram, were respectively described therein as owners each of a 5 biswas share. On the 28th September, 1883, Gauri Sahai obtained a decree for enforcement of lien against the entire zamindari rights of Kalian Singh in mauza Deva, hypothecated in the bond of the 2nd January, 1875, but his claim against the person and other property of the obligor was dismissed. Owing to some antecedent litigation that had taken place between Bijai Kuar on the one side, and Kalian Singh and Musammat Janki on the other, in reference to the 5 biswas share recorded in Janki's name, a compromise was arrived at between them, by which it was agreed "that mutation of names in respect of the property in dispute should be effected in favour of Musammat Bijai Kuar, and that she should remain as heretofore in possession of the said property and other properties situate in mauza Deva and mauza Ghasita, and that the said property shall be responsible for any debts due from us Kalian Singh and Musammat Janki." One her side Bijar Kuar said:—" I shall have no right to transfer any property, nor shall the said property be liable for any debt due from me. I shall have a life-interest in all the estate left by my deceased husband." This arrangement was given effect to by the removal of Janki's name from the *khewat* as to the 5 biswas share, and the substitution of Bijai Kuar's, who thus stood entered in respect of two shares of 5 biswas each.

On the 14th April, 1884, Gauri Sahai made his first application or execution by attachment and sale of the hypothecated rights and interests of his obligor, which he described as " 5 biswas entered in

the name of Kalian Singh, judgment-debtor, and 5 biswas in the name of Janki and 5 biswas in that of Bijai Kuar, in mauza Deva, of which Kalian Singh is the owner." As I have already stated, Janki's name had been expunged and no share stood in her name at all. On the 23rd April, 1884, the Court issued an attachment against the whole 15 biswas, and on the 11th of May following they were attached. On the 8th June, 1884, Kalian Singh, the judgment-debtor, died, and Janki, his widow, and Bahori Lal, his son, were substituted as his representatives on the 18th of the same month.

On the 29th of November, 1884, the Subordinate Judge transferred the execution-proceedings to the Collector of the district, and on the 20th June, 1885, the Collector put up and sold only the 5 biswas share which had stood recorded in the name of the deceased judgment-debtor, and which was in the possession of Janki and Bahori Lal as his representatives. Subsequently, Gauri Sahai applied for sale of the 5 biswas which he described as entered in the name of Janki and the 5 biswas in the name of Bijai Kuar. On the 19th September, 1885, Bijai Kuar filed objections, stating that Janki had no interest in the property, that she (Bijai Kuar) was the owner, and that any interests derived by Janki from her deceased husband had already been sold by the decree-holder. The 14th November, 1885, was fixed for the hearing of these objections, but before that date Bijai Kuar died, and on the 11th November Bahori Lal, under the guardianship of his mother, applied to have his name brought on the record in her place with the object of supporting her objections. This was done subject to anything that might hereafter be urged by the decree-holder. On the 5th December, 1885, he in his turn put in objections to the effect that any interest Bijai Kuar might have had in the property died with her, and that she left no rights that could pass to Bahori Lal as her heir; on the contrary, that anything she had was in reality the property of Kalian Singh, that it was hypothecated in the bond of the 2nd January, 1875, and that by the terms of the compromise between Bijai Kuar and Kalian Singh and Janki, the first-named had agreed that the property should be liable for the debts of Kalian Singh. Those objections were heard and disposed of by the Subordinate Judge on the 7th December, 1885; and he held that

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"no specified share of Kalian Singh has been charged under the decree sought to be executed and under the bond dated the 2nd January, 1875, the basis of the decree; on the contrary, a charge was created on the whole right and interest in mauza Deva Kanchan; therefore the share of Kalian Singh in the property, standing in the name of Bijai Kuar, should also be considered hypothecated. The objection that the property of Bijai Kuar had been exempted should not have been allowed. She might have perhaps continued in possession during her life, but she died while the suit was pending. The son of Kalian Singh, the heir of the judgment-debtor, wishes to become the representative of Bijai Kuar, but the Court thinks none can become her representative, her interest having been merely life interest: *ordered* that the *claim* be disallowed with costs."

It is obvious therefore, from the terms of the order of the Subordinate Judge, that the proceeding before him had reference to the objections which had been filed by Bijai Kuar, and supported by Bahori Lal, through his guardian, pursuant to the order granted on the application of the 11th November, 1885. The decision of the Subordinate Judge was appealed from by Bahori Lal to the Judge, and among the pleas was the fourth to the following effect:—"As applicant is the representative of Kalian Singh, judgment-debtor, and the execution is taken out against him, all the objections raised by him *should have been set at rest under s.* 244 *of the Civil Procedure Code*, and he should not be made to prefer a claim." The Judge disposed of the case upon a preliminary point of jurisdiction, holding that as "the decree, in the execution of which the objection is taken, is over Rs. 5,000 in amount," this Court, and not his Court, was the proper appellate tribunal. He accordingly returned the memorandum of appeal for presentation here, and this is the mode in which the matter comes before us. When the case came on for hearing, Pandit *Bishambar Nath*, for the respondent, took a preliminary objection to the effect that the proceeding before the Subordinate Judge having taken place in reference to the claim of Bahori Lal, as the heir of Bijai Kuar, to have the 10 biswas share released from attachment, his order must be regarded as passed under s. 281 of the Civil Procedure Code, and such being the case, and it being conclusive,

subject to Bahori Lal's bringing a suit to establish his right, no appeal lay to this Court. In reply for the appellant, it was urged that the proceeding before the Subordinate Judge must be regarded as held under s. 244, Bahori Lal being the representative of Kalian Singh, and in support of this contention a ruling of the Privy Council—*Wahed Ali* v. *Jumaee* (1)—and one of this Court—*Ram Ghulam* v. *Hazaru Kuar* (2)—were referred to.

I think that the preliminary objection urged for the respondent is a valid one and must prevail. It is clear that the objections filed by Bijai Kuar on the 19th September, 1885, were put in under s. 278 of the Code, and that, whether rightly or wrongly, she claimed to be entitled to the two shares of 5 biswas each, and on that ground to have the decree-holder's attachment released. Had she survived, those objections would have had to be considered and disposed of in the manner provided in ss. 280 and 281, and had the decision been adverse to her, her remedy, and her only remedy, would have been a suit of the kind mentioned in s. 283. All that Bahori Lal sought to be allowed to do was to come in as the representative of Bijai Kuar for the purpose of supporting those objections, and it was his claim to do this that was rejected by the Subordinate Judge, and nothing more. It was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct and apart from that he filled as the legal representative of his deceased father, in which capacity he had been cited after the passing of Gauri Sahai's decree. No application had been put in by the decree-holder, which would have made the second paragraph of s. 234 applicable, and in my opinion it is impossible to hold that the question decided by the Subordinate Judge, which is sought to be impeached on appeal here, was one that fell within the purview of cl. (*c*), s. 244 ; on the contrary, if any section covers the Subordinate Judge's order, it must be s. 281. I do not think that because Bahori Lal happens, for the purpose of the execution-proceedings under Gauri Sahai's decree, to be the legal representative of his father Kalian Singh, and to be liable to satisfy it to the extent of any assets which may have come to his hands, that any rights claimed by him through a third person must be

(1) 11 B. L. R. 149. (2) I. L. R. 7 All. 547.

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dealt with, and can only be dealt with, between him and the decree-holder in the execution-proceedings, in which, be it observed, only for the property of the deceased which has come to his hands, and has not been duly disposed of, can any personal responsibility attach to him. I do not understand the Privy Council ruling, or the judgment of this Court referred to by the appellant's learned pleader, to lay down the proposition that the legal representative of the judgment-debtor, brought in after decree, is constrained to have his title, possibly to a large property, determined by the summary method adopted in execution-proceedings, and that because he is another man's legal representative, he is placed in a worse position than other people, and has no remedy by suit. Both the cases had reference to persons who had been cited in the suit as representatives of a deceased person before decree, and so far as the ruling of their Lordships of the Privy Council was concerned, its direct object was to determine that such persons were parties to the suit for the purpose of s. 11 of Act XXIII of 1861, and their remarks referred to by my brother Oldfield in *Ram Ghulam* v. *Hazaru Kuar* (1) are directed to that point and that point only. I allow the preliminary objection, that the order here was not passed under s. 244 of the Code, and dismiss the appeal with costs.

MAHMOOD, J.—I confess that I have had considerable doubts upon the question of law raised in this case, and the difficulty is considerably enhanced by the fact that there exists a long conflict of decisions in the published reports as to how far the representative of a judgment-debtor can be dealt with as a party to the suit for purposes of execution-proceedings relating to the questions under s. 244 of the Civil Procedure Code. The most important case upon the subject is *Wahed Ali* v. *Jumaee* (2), where the Lords of the Privy Council held that a party sued in a representative character, against whom a decree is obtained, is a party to the suit for purposes of execution of such decree. The same is the effect of *Oseem-un-nissa Khatoon* v. *Ameer-un-nissa Khatoon* (3). The rule appears to have been carried further by a Division Bench of the Calcutta High Court in *Ameer-un-nissa Khatoon* v. *Meer Mozuffer Hossein Chowdhry* (4), where the same rule was applied to the case of a person

(1) I. L. R., 7 All. 547.
(2) 11 B. L. R. 149.
(3) 20 W. R. 162.
(4) 12 B. L. R. 65.

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who was not a party to the decree, but had been brought upon the record as representative of the deceased judgment-debtor in the execution-proceedings. The view is in accord with a much older ruling of the Madras High Court in *Buddu Ramaiya* v. *C. Venkaiya* (1), where it was held that questions arising between the parties to the suit cannot be limited to questions arising between those who were parties to the suit at the date of the decree; but after decree the representative of a decree-holder, or the representative of a defendant against whom an execution is sought, become parties to the suit for the purposes of execution. The same is the effect of a later ruling of the same Court in *Kuriyali* v. *Mayan* (2). On the other hand, the rulings of this Court in two cases—*Abdul Rahman* v. *Muhammad Yar* (3) and *Awadh Kuari* v. *Raktu Tiwari* (4) seem to proceed upon a *ratio decidendi* which appears to be inconsistent with the rulings above referred to. Indeed, in *Nimba Harishet* v. *Sita Ram Paraji* (5), Sargent, C. J., referring to the former of these cases, declined to follow it, regarding it to be inconsistent with the Privy Council ruling, and he adopted the ruling of the Madras Court in *Arundadhi Ammyar* v. *Natesha Ayyar* (6). Again, the rulings of this Court in *Ram Ghulam* v. *Hazaru Kuar* (7) and *Sita Ram* v. *Bhagwan Das* (8), in both of which I concurred with my brother Oldfield, laid down the rule that the representative of the judgment-debtor who had objected that the property attached had been acquired by himself, and not inherited from the judgment-debtor, and was therefore not liable in execution, must be treated as a party to the suit within the meaning of s. 244 of the Civil Procedure Code, and the objection must be dealt with in execution of the decree. I must also here point out that whilst in the latter of these cases the representative of the judgment-debtor was brought upon the record in the execution-proceedings subsequent to the decree, in the former case the representatives were themselves impleaded in the original suit in that capacity, and the decree had been obtained against them. In delivering my judgment in the case, whilst concurring with my brother Oldfield, I expressed the view that the turning point upon which the application of the rule contained in s. 244 of the Civil

(1) 3 Mad. H. C. Rep. 263.
(2) I. L. R., 7 Mad. 255.
(3) I. L. R., 4 All. 190.
(4) I. L. R., 6 All. 109.
(5) I. L. R., 9 Bom. 458.
(6) I. L. R., 5 Mad. 391.
(7) I. L. R., 7 All. 547.
(8) I. L. R., 7 All. 783.

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Procedure Code, barring adjudication in a regular suit, depends, is, whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. And I also held that this view was consistent with the *ratio decidendi* which had been adopted by my brother Oldfield in *Shankar Dial* v. *Amir Haidar* (1), and which I followed in *Nath Mal Das* v. *Tajammul Husain* (2), and at the same time I expressed my dissent from the ruling of a Division Bench of the Calcutta Court in *Kanai Lall Khan* v. *Sashi Bhuson Biswas* (3), which goes the length of holding that even where a person, upon the death of a Hindu widow, is made a party to the suit as reversionary heir to the estate, and a decree is passed against him, he may in a subsequent suit claim to establish that the decree covered only the life-interest of the widow. The *ratio decidendi* adopted in the ruling seems to be that, although the plaintiff was impleaded in the decree as the representative of the widow, the nature of his claim was such as to exclude it from the operation of s. 244 of the Code—a view which I could not reconcile with the ruling of the Lords of the Privy Council in *Wahed Ali* v. *Jumaee* (4). These are not the only reported cases which complicate the question; and in this state of the case-law, I felt inclined to ask the learned Chief Justice to refer this case to the Full Bench. But I am not prepared to dissent from him in the distinction which he has drawn between this case and the rulings to which I have referred. The present appellant was no party to the original decree of the 28th September, 1883, and he was impleaded in execution-proceedings as the representative of the original judgment-debtor, Kalian Singh, and in that capacity he might, according to the rulings to which I have already referred, be treated as a party to the suit for purposes of s. 244 of the Code. But the case, as it has come before us, does not, as the learned Chief Justice has shown, relate to such capacity. In the execution-proceedings a third party, Musammat Bijai Kuar, who could under no conditions be regarded as the representative of the judgment-debtor, Kalian Singh, raised objections on the 19th September, 1885, to the attachment of the property, and her objections were undoubt-

(1) I. L. R., 2 All. 752.
(2) I. L. R., 7 All. 30.
(3) I. L. R., 6 Calc. 777.
(4) 11 B. L. R. 149.

edly such as are contemplated by ss. 278-281 of the Civil Procedure Code. The 14th November, 1885, was fixed for the hearing of the objections; but the objector died in the meantime, and the present appellant had his name substituted as the representative of the objector, and the objections were disposed of on the 7th December, 1885, and this is the order from which this appeal has been preferred.

Upon this state of things, I am not prepared to dissent from the learned Chief Justice in the view that the case is not on all fours with the Privy Council ruling in *Wahed Ali's Case* (1), and that it is distinguishable from the other rulings to which reference has been made. Nor am I prepared to dissent from him in the view that the mere circumstance of the representative of a deceased judgment-debtor becoming the representative also of a deceased third party, who was objector in the execution-proceedings, will not preclude him from prosecuting those objections, and that the adjudication upon such objections falls beyond the scope of s. 244 of the Code. Indeed, as the learned Chief Justice has pointed out, the matter was dealt with in the Court below as objections by a third party, and there can be little doubt that the order of the 7th December, 1885, now under appeal, was passed under s. 281 of the Code, as it disallowed the objections upon the ground that the appellant had inherited nothing from the original objector, Musammat Bijai Kuar. And this being so, I am not willing to disagree with the learned Chief Justice in holding that, under the circumstances of this case, the proper remedy for the appellant would be a suit such as is contemplated by s. 283 of the Code.

For these reasons I concur in the order which the learned Chief Justice has made.

Appeal dismissed.

CRIMINAL REVISIONAL.

1886
August 2.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* LOCHAN.

Murder—Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 (*Penal Code*), *ss.* 300, *Exception* 1, 302, 304.

An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence

(1) 11 B. L. R. 149.

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showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so He found her in the act of connection with her paramour, and killed her with the chopper.

Held that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress* v. *Damarua* (1) and *Queen-Empress* v. *Mohan* (2) referred to.

THIS was a case the record of which was called for by Straight, Offg. C. J., in the exercise of the High Court's powers of revision. The case was one in which one Lochan had been convicted by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, of culpable homicide not amounting to murder, and sentenced to five years' rigorous imprisonment, the Sessions Judge's order being dated the 11th March, 1886.

The facts of the case are stated in the order of the Court.

Neither the prisoner nor the Crown was represented.

STRAIGHT, Offg. C. J.—This is a case of revision in reference to a decision of the Judge of Gorakhpur, convicting the accused Lochan of culpable homicide not amounting to murder, and sentencing him to five years' rigorous imprisonment. The case was called up by me, on perusal of the Gorakhpur sessions statement for March, and we have had notice issued to the accused to show cause why the conviction recorded against him should not be altered to one of murder under s. 302 of the Penal Code, and why his sentence should not be enhanced to that provided for that offence.

The circumstances of the case are shortly these. The accused Lochan, son of Janki, Sainthwar by caste, aged 25, resided at the village of Balohi in the Tarkalwa Police circle. Along with him lived Musammat Jadni, deceased, aged about 25, the widow of his deceased first cousin Ramphal. On the evening of Thursday, the 10th of December last year, about 8 o'clock, the accused was near his house, cutting up sugar-cane with a *gandasa*, and near by him were two men, Wali *Julaha* and Musa *Ahir*. According to the evidence of these persons the deceased, Musammat Jadni, passed

(1) Weekly Notes, 1885, p. 197. (2) *Ante*, p. 622.

close to them alone, going in a southerly direction, and soon after she had gone on her way, the accused followed, taking his *gandasa* with him. As to what then happened we learn from the evidence of one Beni Madho, a caste-fellow of the accused, who says that on the night of the 10th the accused came to him and stated that Musammat Jadni was lying dead in the *arhar* field. "She was committing fornication with Phul, Panthwar. I went up, and Phul ran away. I then killed her with my chopper." The body of Musammat Jadni was found on the 11th lying under a mango tree, with a number of wounds upon the neck, head, and arms, and it was obvious that death must have supervened almost immediately upon the infliction of these injuries. Complaint was lodged at the Tarkalwa police station on the morning of the 12th, and the accused was, in due course, arrested. Before the Magistrate Phul, the man referred to by the accused in his statement to Beni Madho, deposed to the effect that he was in the act of having connection with Musammat Jadni under the mango tree when he was surprised by the accused; that he thereupon jumped up and ran away, and as he ran he turned round and saw the accused striking the deceased woman. In the Sessions Court he denied that he was in the act of having connection with Musammat Jadni when the accused came up, and stated he was only conversing with her. The assessors did not believe the evidence for the prosecution, but such reasons as they gave for not doing so appear to be quite insufficient. The learned Judge was of opinion that the guilt of the accused, of having caused the death of Musammat Jadni, was fully established; but he considered that, having regard to all the facts, the act of the accused in doing so was, by reason of grave and sudden provocation, reduced to culpable homicide not amounting to murder. He therefore convicted him of that lesser offence, and sentenced him to five years' rigorous imprisonment. With regard to this decision, all I have to say, in the first place is, that the evidence and all the surrounding circumstances, to my mind, place it beyond doubt that the hand of the accused did the unfortunate act which caused the deceased woman's death. I see no reason whatever for distrusting the testimony of Beni Madho, and I think the learned Judge gives a reasonable explanation of his somewhat singular conduct in not at once reporting what the

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accused had said to him on the night of the commission of the crime. No doubt there is the contradiction to which I have already adverted in Phul's two depositions; but the learned Judge has preferred that made in the first instance before the Magistrate, and it was in the prisoner's interest that he did so, for the purpose of measuring the nature of his offence; and though he may have so far discredited his later statement, I do not think this discrepancy should invalidate the rest of his evidence. But I think the learned Judge was wrong in holding that there was grave and sudden provocation of the kind that reduced the offence of the accused from murder, with which he was charged, to culpable homicide not amounting to murder. I have already, in the case of *Queen-Empress* v. *Damarua* (1) stated the rule, as I believe it to be, which governs the matter, and my brother Brodhurst and I have recently acted on the same view in *Queen-Empress* v. *Mohan* (2). In the first place, the relation in which the accused stood to the deceased was not that of a husband, though it is quite possible, from her living in the house with him, that they were on intimate terms, and that his act may have been animated by jealousy. But there is no proof of this, and I must take the accused's own version of the matter; and even adopting the learned Judge's view that he caught Musammat Jadni in the very act of connection, I am of opinion that there was no grave and sudden provocation proved of the character that a Court of Justice ought to accept as reducing the crime of murder to that of culpable homicide. The accused taking the chopper with him, and thereby indicating that he contemplated resorting to violence, followed the deceased woman a considerable distance, obviously, to my mind, with the belief that she was going to keep an assignation, and with the deliberate purpose of detecting her in doing so. He neither called her to come back, nor remonstrated with her, nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, he went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence. As I have already observed, he was not the husband of the woman, and there was no moral obligation upon him to constitute himself her executioner for her transgres-

(1) Weekly Notes, 1885, p. 197. (2) *Ante*, p. 622.

sion. I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation, for (to quote a passage cited from *Oneby's Case*, 2 Lord Raymond, 1485, in "Russell on Crimes and Misdemeanours," Vol I, 4th ed. p. 725) "in cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty." Such being the view I take of the case here, the conviction of the accused must be altered to one of murder under s. 302 of the Penal Code, and in accordance with s. 439 of the Criminal Procedure Code, the sentence will also be altered to that provided for the offence, namely, transportation for life. I think, however, that, having regard to the facts, and making allowance for the peculiarities of native character in reference to the misconduct of women of their families, especially among the less advanced and more ignorant residents of the rural districts, I may properly recommend the Government to commute the sentence to fourteen years' transportation.

MAHMOOD, J., concurred.

APPELLATE CIVIL.

1886
August 3.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HARDEO DAS (APPELLANT) *v* ZAMAN KHAN (RESPONDENT).*

Execution of decree—Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.

S 253 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

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* Second Appeal No 58 of 1886, from an order of W. H Hudson, Esq., District Judge of Farukhabad, dated the 15th April 1886, reversing an order of Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 6th January, 1886.

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The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety.

Held that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

THE facts of this case are stated in the judgment of the Court.

Munshi *Kashi Prasad*, for the appellant.

Shah *Asad Ali*, for the respondent.

OLDFIELD, J.—One Dwarka Prasad obtained a decree against the respondent Muhammad Sahib Zaman Khan, and it was affirmed in appeal by the District Court on the 10th December, 1881. After this he took out execution to recover costs awarded. The respondent applied to stay execution on the ground that he proposed to file an appeal to the High Court.

Execution was not, however, stayed and the costs were deposited by the respondent and paid to Dwarka Prasad, and the appellant gave a bond, by which he undertook to refund the amount to the respondent, in the event of the latter succeeding in his appeal to the High Court and of Dwarka Prasad failing to repay to him the amount. The respondent subsequently filed an appeal to the High Court and was successful; and he then applied in the execution department to recover the sum from the appellant, and his application was disallowed by the Court of first instance, but has been allowed in appeal by the Judge. The appellant appeals to this Court on the ground that the Court executing the decree had no jurisdiction in the matter. I think the plea is valid. Ss. 545 and 546, and 253, Civil Procedure Code, have been referred to as enabling the Court to deal with the respondent's application, but they do not appear to be applicable. S. 545, Civil Procedure Code, contemplates proceedings to stay execution of decree on security being given by the applicant, and s. 546 is a provision for staying execution when an appeal is pending, but the security given in the case before us was not made under circumstances to which the provisions of that section are applicable.

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S. 253 provides that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. But this section contemplates that there shall be a suit pending at the time security is given for its performance, and would not seem to apply to a case like this, where no suit can be said to have been pending, as the litigation in the Court of first instance and Court of appeal had ended, and no second appeal had been instituted in the High Court when security was given.

I do not therefore think that s. 253 will apply so as to allow the decree of the High Court to be executed against the surety.

I would decree the appeal, and set aside the order of the Court below with costs, and restore the order of the Court of first instance.

MAHMOOD, J.—I agree.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1886
August 6.

ACHOBANDIL KUARI (DEFENDANT) *v.* MAHABIR PRASAD (PLAINTIFF).*

Vendor and purchaser—Non-payment of consideration money—Burden of proof.

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

Held that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

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* Second Appeal No. 1509 of 1885, from a decree of R J. Leeds, Esq, District Judge of Gorakhpur, dated the 3rd August, 1885, modifying a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 20th December, 1884.

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Held, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.

THE facts of this case are stated in the order of remand.

Babu *Baroda Prasad*, for the appellant.

Mr. *J. Simeon*, for the respondent.

TYRRELL, J.—The plaintiff brought this suit as heir to his brother, who, in January, 1876, is said to have purchased from the appellant and her mother and other persons a two annas and eight pies share in mauza Nagpur. The plaintiff alleges that his brother got possession after the purchase, and held possession until his death, and after his death, he held possession until (Asarh 1288) 1881, when he was forcibly ejected by the vendors, of whom appellant is one. He therefore sued for reinstatement and for mesne profits. The appellant defended the suit, admitting that the deed of January, 1876, had been executed and registered by the vendors, but alleging that the transaction stopped there, no consideration having been received, and no possession transferred, the plaintiff's allegation as to his possession being untrue. The first Court gave the plaintiff-respondent a decree, and the defendants appealed to the District Judge, who found that the appellant's allegation was true as to possession never having been given to the plaintiff-respondent or to his brother, the original vendee. On the plea as to consideration, the Judge found that execution of the sale-deed being admitted by the defendants, who also had acknowledged receipt of consideration before the Registrar, the burden of proving non-payment of consideration rested on them, and that they had failed to prove its non-payment. The Judge thereupon decreed the suit against the appellant in favour of the plaintiff, exempting Musammat Chundar Bali on the ground of minority.

It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years.

This state of things, combined with the continuous possession of the vendors, favoured the allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff-vendee to give evidence that consideration had in fact passed.

In order that an inquiry may be made on this point, we must remand this case for trial of the following issue :—

Did the brother of the respondent pay the consideration of the sale-contract to the appellant and the other vendors under the deed of January, 1876; and if he did, how does it come to pass that he has been kept out of possession till the present time ?

On return of the finding, ten days will be allowed for objections.

OLDFIELD, J.—I concur.

The lower appellate Court found on this issue against the respondent, as he produced no evidence to prove payment of the purchase-money. On the return of its finding the High Court delivered the following judgments :—

OLDFIELD, J.—We must decree this appeal. It was for the plaintiff-respondent, under the circumstances of this case, to prove that consideration-money passed on the sale-deed of January, 1876, and to account for being out of possession of the property since the alleged purchase No evidence was adduced by him on this point in the first Court, nor in the lower appellate Court, although we remanded the case for that purpose. The Judge says that the respondent had ample opportunity afforded him of adducing evidence, but no evidence of any kind was adduced by him, and as he has not established that any consideration was paid, the suit fails.

The decisions of both the lower Courts must be set aside and the plaintiff's suit dismissed with costs in all the Courts.

TYRRELL, J —I am quite of the same opinion. We remanded the case in the interest of the respondent, to enable him to adduce proof of payment of consideration and explain the fact of being out of possession. In the absence of any evidence, the Judge was obliged to find the issue against him, and under these circumstances we have no alternative than to hold that his suit fails.

Appeal allowed.

1886
August 6.

Before Mr. Justice Oldfield and Mr Justice Tyrrell.

BASDEO (DEFENDANT) *v.* GOPAL (PLAINTIFF) *

Limitation—Suit to obtain a declaration that an alleged adoption is invalid or never took place—Suit for possession of immoveable property—Act XV of 1877 (Limitation Act), sch. ii, Nos 118, 141.

Art. 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance.

Held that the limitation applicable to the suit was art. 141 and not art 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation.

THE facts of this case are stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Ratan Chand*, for the respondent.

OLDFIELD and TYRRELL, JJ.—The plaintiff claims certain immoveable property by right of succession to one Bhagirath, on the death of the latter's widow, Musammat Rajo. The defendant Basdeo attached the property as belonging to his judgment-debtor, Chatarbhuj, defendant, and the plaintiff's objection was disallowed by the Court executing the decree, under s. 281 of the Civil Procedure Code. The plaintiff has brought his suit to set aside the order, remove the attachment, and obtain possession. The defendant set up a title based on the adoption of Chatarbhuj by Musammat Rajo.

* First Appeal No. 134 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 31st May, 1886.

The question before us is whether the suit is barred by limitation.

The suit has been brought within one year of the order of the Court under s. 281 of the Civil Procedure Code, and is not barred with reference to art. 11 of the Limitation Act, but the Court of first instance held that it was barred by art. 118, treating it as a suit to obtain a declaration that an alleged adoption is invalid or never took place. The lower appellate Court, on the other hand, held that it was a suit for possession of immoveable property, governed by art. 141, and was within time.

We are of opinion that the Subordinate Judge is right. The suit is not to obtain any declaration that the alleged adoption set up is invalid, but it is for recovery of possession of immoveable property, for which there is a special limitation. Art. 118 only applies to suits where the relief sought is of a purely declaratory nature; it is discretionary in a Court to grant this sort of relief, and the suit for a declaration is distinct from a suit for possession of property, and it is instituted on a stamp of much smaller value, and the suit for possession of property cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption.

The Privy Council decision in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1) has no application. That decision dealt with the limitation in art. 129 of the old Act IX of 1871, which referred to suits to aside an adoption, and their Lordships held that the terms "to set aside an adoption" referred to and included suits which bring the validity of an adoption into question, and applied indiscriminately to suits to have an adoption declared invalid and for possession of land, when the validity of an alleged adoption is brought into question.

But that decision had peculiar reference to the terms in which art. 129 was framed. The present law of limitation has made an alteration. It contains no such article as 129. On the other hand, we have arts. 118 and 119, the former for suits to obtain a declaration that an alleged adoption is invalid or never took place, and the latter to obtain a declaration that an adoption is valid;

(1) Decided 9th April, 1886.

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and the period of limitation is reduced to six years, and the time from which it will run is altered, and the Act provides separately for suits for possession of property by art. 141.

There is no ambiguity about art. 118 as there was about art. 129 of the old law, and it can be held only to refer to suits purely for a declaration that an alleged adoption is invalid or never, in fact, took place; and where the suit is for possession of property, to which another limitation law is applicable, it will be governed by it, although the question of validity of adoption may arise. As already observed, it is discretionary in a Court to grant relief by declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescibed for the former.

It is observable that, in the case we have referred to, their Lordships of the Privy Council remarked upon the difference between the language of art. 129 of Act IX of 1871, which they designate as being of a loose kind, and the precise terms of arts. 118 and 119 of Act XV of 1877, which we have described above. We dismiss the appeal with costs.

Appeal dismissed.

1886 *August* 9.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

GOPI CHAND AND ANOTHER (DEFENDANTS) *v.* SUJAN KUAR AND OTHERS (PLAINTIFFS).*

Hindu Law—Sadhs—Partition between widow and mother, both claiming life interest—Alienation by mother—Reversioner—Declaratory decree.

Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration, and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. The parties were Sadhs.

* Second Appeal No 1847 of 1885, from a decree of C J. Daniell, Esq., District Judge of Farukhabad, dated the 19th September, 1885, confirming a decree of Munshi Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 17th June, 1885.

Held that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law.

Held that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision come to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners.

Held also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death.

THE facts of this case are stated in the judgment of the Court.

Mr. *G. T. Spankie* and Mr. *Sinha*, for the appellants.

Mr. *W. M. Colvin* and Babu *Ram Das Chakarbati*, for the respondents.

OLDFIELD and TYRRELL, JJ.—This suit has been brought to set aside a gift of certain property made by one Rani Bai, defendant, in favour of the co-defendants, her nephews. The property belonged to Gur Bakhsh; from him it passed to his son Kuar Chand, and at his death his heir was his widow Musammat Anandi. He left also a daughter, the plaintiff, and her sons, also plaintiffs. They sue as reversioners to set aside the gift.

It appears that on Kuar Chand's death, his mother, Rani Bai, and his widow Anandi, disputed as to the property, and the dispute was referred to arbitration. An award was made, by which the property left was divided between Rani Bai and Anandi. This was in 1868, and a decision given on the award, and the property, the subject of the gift, was part of what came to Rani Bai. The plaintiffs assert that Rani Bai had no power to give the property, having only a life-interest under Hindu law.

The parties are Sadhs, and the defence is that Hindu law does not govern the succession to the estate of Kuar Chand; that Musammat Rani got the property absolutely in 1868, and has held adversely to the heirs and reversioners; that the plaintiffs are remote reversioners and have no right of suit, and have no right as reversioners to Rani Bai, so as to be able to contest her acts.

These were the substantial defences which were set up, and were disallowed by the Courts below which decreed the claim, and

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the defendants in second appeal have raised the same contentions.

We do not consider any of them to be valid. Presumably the Hindu law of inheritance is applicable to the parties, and the defendants have not shown that any custom among the Sadhs, having the force of law, prevails opposed to Hindu law. Under Hindu law, on the death of Kuar Chand, Musammat Anandi Bai would succeed to a life-interest as his widow; but a dispute arose between her and her mother-in-law, Rani Bai, and the property was divided by award of arbitrators. It does not appear that either Rani Bai or Anandi claimed to take the property absolutely, but only disputed as to who was to have a life-interest in it; and it was the latter that was the subject of dispute and of the arbitration. Rani Bai was, under any circumstances, entitled to maintenance, and the decision come to was to put her in possession of half the property, but only on the footing of a woman's interest for life; and this being so—and it is the view taken by the Courts below of the arbitration award—we are of opinion that the defendants cannot set up any title by adverse possession on Rani Bai's part to defeat the claim of reversioners.

There remains the question whether the plaintiffs can maintain this suit. We think they can as reversioners to Anandi Bai. The arbitration award only settled a dispute between Anandi and Rani Bai, and it gave Rani Bai no higher title than Anandi Bai could bestow; that is, an interest in the property rightfully belonging to Anandi, so long as Anandi lived, but no longer. So far as reversioners are concerned, Rani Bai's act is the act of Anandi; and the plaintiffs, as reversioners to Anandi, can sue to set it aside. The gift is the act of one whom Anandi has put in a position to deal with the property, and who has dealt with it injuriously to plaintiffs' reversionary interests.

The decree of the Courts below is in effect to render the gift operative so long as Rani Bai lives; but in the view we take of the case, the decree will be made for a declaration that the gift shall not affect any rights of the plaintiffs as reversioners after the death of Anandi Bai. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1886
August 9.

Before Mr. Justice Straight, Offg. Chief Justice.

QUEEN-EMPRESS *v.* ISMAIL KHAN AND OTHERS.

Act XLV of 1860 (*Penal Code*), *ss* 459, 460.

Ss. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house trespass or house breaking.

THIS was an appeal from a judgment and order of Mr. T. R. Wyer, Sessions Judge of Meerut, dated the 8th June, 1886, convicting the appellant Ismail Khan under ss. 459 and 511 of the Penal Code, and the other two appellants under ss. 460 and 511 of the same enactment.

The facts of this case are stated in the judgment of the Court.

The appellants were not represented.

The *Government Pleader* (*Ram Prasad*), for the Crown.

STRAIGHT, Offg. C. J.—In this case the evidence against the appellants was, that on the early morning of the 13th April last, they were disturbed by a chaukidar while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make their escape, the appellant Ismail Khan firing off a pistol, in what manner and direction it does not appear from the evidence, and the other two appellants attempting to prevent their apprehension by using their *lathis*. It is not suggested that these latter two appellants inflicted any serious hurt upon the police officers, and I do not think that any grave importance attaches to that part of the case. The learned Sessions Judge has convicted the appellant Ismail Khan of attempting to commit the offence provided for in s. 459, Indian Penal Code, and he has convicted the other two appellants of an attempt to commit the offence provided for in s. 460 of the same Act. I am very clearly of opinion that neither of these convictions can stand. Ss. 459 and 460 provide for a compound offence, the governing incident of which is that either "a lurking house

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trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. In other words, the causing of the grievous hurt, or the attempt to cause death or grievous hurt, must be done in the course of the commission of the offence of lurking house-trespass or house-breaking, and at the time when such lurking house-trespass or house-breaking is being committed. The provisions of these sections being of a highly penal nature, and inflicting very severe punishment upon conviction, it is necessary that they should be construed strictly ; and in my opinion it was not contemplated that where the principal act done by the accused person amounts to no more than a mere attempt to commit the offences of lurking house-trespass or house-breaking, the section should be applicable. The convictions as recorded by the Judge are quashed, and I direct that they be recorded under ss. 452 and 511 of the Indian Penal Code, that is, for attempted house-breaking by night. The sentence passed on the prisoner Ismail Khan will be altered to transportation for the term of seven years. Inayat and Gullarh will be rigorously imprisoned for the term of five years. Such sentences to commence from the date of their conviction in the Sessions Court.

1886 *August* 12.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

PARAM SUKH AND OTHERS (DECREE-HOLDERS) v. RAM DAYAL (JUDGMENT-DEBTOR).*

Privy Council decree—Execution for costs—Rate of exchange—Civil Procedure Code, s. 610—Meaning of "for the time being."

Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed.

The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11, under s. 610 of the Civil Procedure

* First Appeal No. 132 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 6th April, 1886.

Code,—*held* that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to.

THE appellants, in whose favour a decree had been made by Her Majesty in Council, dated the 12th December, 1884, which awarded them £119-11 as costs, applied, on the 6th January, 1886, to the High Court, under s. 610 of the Civil Procedure Code, for transmission of the decree to the Court of first instance for execution. This application was granted, and the decree was transmitted accordingly to the Subordinate Judge of Aligarh. In their application for execution the appellants, with reference to s. 610 of the Civil Procedure Code, estimated the sum of £119-11 at the rate of exchange current at the date of the application, and they claimed pleader's fees in respect of the application and also in respect of the application to the High Court.

The respondent—the judgment-debtor—objected that the sum of £119-11 should be estimated at the rate of exchange current at the date of the decree, and that no pleader's fees were chargeable under the existing practice in respect of applications for execution of decrees.

The Subordinate Judge held that the rate of exchange prevailing at the date of the decree, and not that prevailing at the date of the application for execution, was applicable, and further, that pleader's fees should not be allowed. On the latter point the Subordinate Judge observed as follows :—"I hold that the pleader's fee for execution of the decree should not be allowed separately to the decree holders on account of this Court and the High Court. The fee received, at the rate of 5 per cent., at the time of the institution of the suit or appeal, was sufficient; for under para. 67, Circular Order No. 7 of 1882, a pleader, already engaged, is bound to prosecute the suit till the end of it, and to make an application for execution of the decree; and the order of the High Court does not provide that the pleader's fee for the application, which was filed in the High Court on the 6th January, 1886, under s. 610 of the Code of Civil Procedure, should be awarded."

The appellants contended that the Subordinate Judge was wrong in applying the rate of exchange prevailing at the date of

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the decree, and that costs of execution incurred in the High Court and the Court below ought to have been awarded.

With reference to the latter contention, the Court (Oldfield and Tyrrell, JJ.) called for a report from the office as to the practice in allowing pleaders' fees on applications for execution made to the High Court of decrees of that Court and of the Privy Council, with reference to rule 67, p. 287, General Rules and Circulars (Civil), N.-W. P.

The Registrar reported that "it is not the practice to allow any fees in cases of execution of—(i) decrees of this Court on its original side, (ii) decrees of the Privy Council. The orders in the former case and the decrees in the latter instance are merely transmitted to lower Courts for execution."

Babu *Jogindro Nath Chaudhri*, for the appellants.

The respondent did not appear.

OLDFIELD, J.—This appeal is preferred against the order of the Subordinate Judge of Aligarh, passed upon objections of the judgment-debtor, against whom a decree of the Privy Council was being executed. The decree-holders took out execution for a sum of £119-11 awarded to them, and the question is, at what rate of exchange that sum should be made available to the decree-holders in rupees.

It appears to me that, under the last paragraph of s. 610, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and that the words "for the time being" mean the year in which the amount is realized, or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to. On this point, therefore, this appeal succeeds.

The appellants' pleader gives up the other plea as to the decree-holder's right to costs of execution.

The lower Court must be directed to proceed with the application for execution of decree in accordance with the view of the law recorded above.

The decree-holders appellants are entitled to the costs of this appeal, which are fixed at one gold mohur or Rs. 16.

TYRRELL, J.—I concur.

Appeal allowed.

APPELLATE CRIMINAL.

1886
August 24.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* GIRDHARI LAL.

Act XLV of 1860 (*Penal Code*), *ss.* 24, 25, 218, 464, *clause* 3—*Forgery*—"*Dishonestly*"—"*Fraudulently*"—*Public servant framing incorrect record.*

A Treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500, which was in the Treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to.

Held, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside.

Held also that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code.

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Held further that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code.

THIS was an appeal from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 10th May, 1886, convicting the appellant of an offence under s 465, and two offences under s. 218, of the Penal Code.

The appellant, Girdhari Lal, in August, 1882, was employed as Treasury Accountant in the Etah Collectorate. On the 19th August, 1882, a sum of Rs 500, "decree-money payable to Sewa Ram of Janera, pargana Marehra," was paid into the Treasury by one Balwant Singh, and the name of the depositor, the date of receipt, and the nature of the deposit, as quoted above, were duly entered opposite Deposit No. 214 in the Revenue Deposit Register of the Etah Treasury. This money, payable to Sewa Ram, was subsequently all drawn and paid away to persons other than Sewa Ram by means of three forged cheques or repayment orders $\frac{40}{1137}$, $\frac{70}{332}$, and $\frac{48}{1150}$. These payments were duly entered on the right-hand page for "details of repayment" of the Deposit Register already mentioned These repayments appeared to have been made at the same time that the forged cheques were drawn and the money was paid. Cheque or repayment order No. 49 of Book 1137 was dated the 3rd July, 1884; cheque No. 70 of Book 332 was dated the 8th September, 1884; and cheque No. 48 of Book 1150 was dated the 30th January, 1885. Thus on the 30th January, 1885, the whole of Deposit No. 214, amounting to Rs. 500, and due to Sewa Ram, had been paid away to persons other than Sewa Ram or his representatives.

On the 20th April, 1885, another sum of Rs. 500 was paid into the Treasury, and was duly entered in the Revenue Deposit Register of that date as received from Muhammad Iltafat Husain, Vakil, decree-money, in re *Musammat Chunni* v. *Makbul Alam* of Salehpur, Rs. 500, Deposit No. 20.

In the meantime, on the 30th June, 1884, Sewa Ram asked that intimation in respect of his money might be sent to the Munsif of Etah and the Subordinate Judge of Mainpuri; and after various formalities Rs. 500 were transferred to the Civil Courts. This case arose out of the manner this money was transferred.

With reference to this money, Puran Mal, sale-muharrir, made a report on the 23rd April, 1885, suggesting that the Rs. 500, which his own file showed to be due to Sewa Ram, should be transferred to the Civil Courts in certain proportions. Upon this followed the usual report from the appellant, the Treasury Accountant, dated the 25th April, 1885, that the Rs. 500, Deposit No. 214, paid in by Balwant Singh on the 19th August, 1882, stood at the credit of Sewa Ram in the Treasury as a revenue deposit. This report was in the handwriting of the appellant and was false.

After this report was written, an order signed by the Treasury Officer for the transfer of the money was written on the 28th April, 1885, and cheque No. 45 of Book 1162 was drawn up by Puran Mal. As originally drawn the cheque related to the deposit of Rs. 500 made in favour of Sewa Ram on the 19th August, 1882. Babu Jainti Prasad, the Treasury Officer, went on leave on the afternoon of the 28th April, 1885, and did not return till the 28th July, 1885. In ordinary course the cheque should have been signed by the Treasury Officer that day or the next. No steps, however, were taken to present it to Babu Jainti Prasad's successor, and it was not presented until after the return of Babu Jainti Prasad on the 28th July, 1885. On that day a petition was presented by Ram Prasad Singh to the effect that his father, Sewa Ram, was dead, and asking that the Rs. 500 due in the case of Sewa Ram *v.* Phula Kuar might be given to him. The usual order was made by the officer acting for Babu Jainti Prasad for an office report. This was written by Puran Mal on the 3rd August, 1885, to the effect that applicant would get him money from the Civil Court. On the same date the appellant added a further report to the effect that this money was in the Treasury as a revenue deposit, but would be transferred to the Civil Court. This was followed by an order to the effect that no order could be given regarding applicant's right to the money, but that it was about to be sent to the Civil Court. This report by the appellant

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was false, as the whole of the money due to Sewa Ram had been entered as repaid as mentioned above.

On the 5th August the cheque No. 45 of Book 1162 was presented to the Treasury Officer, Babu Jainti Prasad, for signature, and was signed by him. It then had been altered so as to relate to the Rs. 500 deposited on the 28th April, 1885, in favour of Chunni Kuar.

The appellant was tried for forging this cheque No. 45 of Book 1162, and with preparing the two false reports mentioned above, marked at the trial as exhibits O and Q, and was convicted in respect of the first charge under s. 465 of the Penal Code, and in respect of the other two charges under s. 218.

It was contended on behalf of the accused before the Court of Session that to support the charge of forgery a dishonest or fraudulent intent must be proved; and to support the charge under s. 218 the intent of the accused to cause, or his knowledge that he was likely to cause, loss or injury to the public must be proved.

Upon this contention the Sessions Judge observed as follows:—

"To take the second and third charges first, I do not think it necessary to follow in detail the decisions which have been appealed to, because it is necessary to admit that the law has been framed and interpreted in a manner so favourable to persons in the position of the accused, that even if it were proved that he had written false reports by the hundred to conceal his own malpractices, he would not be liable under s 218 of the Indian Penal Code, unless it could be shown that he intended to cause or knew it to be likely that he would cause loss or injury to some one. It has also been contended that as the main intention of the accused was to conceal his own fault, this is the only intention that should be looked to. But this seems to be going a good deal further than our lenient laws warrant, and it is necessary to decide whether in the case of the accused there was the intention of causing loss, or the knowledge that such loss or injury was likely to follow. In order to form a judgment on this point it is necessary to follow the dates of the different transactions:—

30*th January*, 1885.—The last portion of Sewa Ram's Rs. 500 was paid away.

20th April, 1885.—The payment of a sum of Rs. 500 rendered the temporary concealment possible.

23rd April, 1885.—Report by Puran Mal to the effect that Sewa Ram's Rs. 500 should be sent to the Civil Court.

25th April, 1885.—Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500, which had been totally paid away, was still in deposit (revenue).

28th April, 1885.—Preparation of cheque in sale department with a view to transfer Sewa Ram's Rs. 500 to the Civil Court.

29th April, 1885, *to 28th July*, 1885.—Absence of Babu Jainti Prasad, Deputy Collector, on leave.

3rd August, 1885.—Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500 was still in the Treasury as a revenue deposit.

5th August, 1885.—Preparation of altered cheque and transfer of Rs. 500 due to Chunni Kuar to Civil Court deposit.

The fact that the first false report followed so closely the payment of the money due to Chunni Kuar, and still more that the second false report of the 3rd August so immediately preceded the transfer of that money—only one day having intervened—seems to justify the conclusion that both false reports were made with the intention of making use of the Rs 500 due to Chunni Kuar to fill the place of the Rs. 500 due to Sewa Ram, which had already been disposed of. The effect of this accused must have known would be to render the prompt payment of Chunni Kuar's money impossible, and that person must now trust to a civil suit for her remedy or appeal to the justice of Government. And even if the money is eventually recovered, Chunni Kuar has suffered wrongful loss, for, according to s. 24 of the Indian Penal Code, 'a person is said to lose wrongfully when such person is kept out of any property, as well as when such person is wrongfully deprived of property.' It must therefore be decided that Chunni Kuar has suffered wrongful loss by the transfer of her money, which in consequence of such transfer has been, as is shown by exhibit T, partially made over to Sewa Ram's representatives. And even if principal and interest should eventually be refunded

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by Government, the wrongful loss will only be transferred to Government."

The accused appealed to the High Court.

Pandit *Ajudhia Nath* (with him Babu *Jogindro Nath Chaudhri*) for the appellant. The conviction under s 465 of the Penal Code is bad. "Forgery" means the making of a "false document" (s. 463), and the false document must be made "fraudulently or dishonestly" (s. 464). "Dishonestly" means with the intention of causing wrongful gain to one person or wrongful loss to another (s. 24), and "fraudulently" implies an intent to defraud (s. 25). Here it is not contended that the appellant, assuming him to have made the alterations in the cheque, did so with the intention of causing wrongful gain to any person: it is said that his intention was to cause wrongful loss. But the evidence shows no such intention on his part. His intention, assuming for the sake of argument that the act is proved, was merely to conceal the previous withdrawal of the Rs 500 standing at Sewa Ram's credit. Such an intention is not fraudulent or dishonest within the meaning of s. 464: *Queen* v. *Jungle Lall* (1), *Queen* v. *Lal Gumul* (2), *Queen-Empress* v. *Fateh* (3), *Queen-Empress* v. *Jiwanand* (4), and *Queen-Empress* v. *Shankar* (5).

Further, the conviction under s. 218 is also bad. That section applies only to a public servant who is charged "as such public servant" with the preparation of the record or other writing which he is said to have framed incorrectly. Here there is no evidence that the appellant was charged with the preparation of the reports dated the 25th April and 3rd August, 1885, respectively, or that the preparation of such reports was one of his duties. He therefore did not prepare them "as such public servant" within the meaning of s. 218. *Queen-Empress* v. *Mazhar Husain* (6) is in point.

The *Offg. Public Prosecutor* (Mr. *A. Strachey*) for the Crown. The conviction is good, because the appellant, in altering the

(1) 19 W. R., Cr. 40
(2) N.-W. P. H. C. Rep., 1870, p. 11.
(3) I. L. R, 5 All. 217.
(4) I. L. R., 5 All. 221.
(5) I. L. R, 4 Bom. 657.
(6) I. L. R, 5 All. 553.

cheque, acted dishonestly and fraudulently within the meaning of ss. 24 and 25 and 464 of the Penal Code. His intention must be inferred from the nature of his act, and from his knowledge of its natural consequences. The inevitable consequence was that when Musammat Chunni Kuar applied for payment of the Rs. 500 due to her, she would certainly be delayed and might conceivably fail altogether in obtaining it. Her right to such payment, instead of being recognised as of course, would be disputed, and her success might be contingent upon the result of a suit for recovery of the money. Under the last sentence of s. 24 of the Penal Code, this amounts to "wrongful loss" being caused to Chunni Kuar. This being the necessary consequence of his act, the prisoner must be presumed to have intended it. His position in the Treasury and his knowledge of the course of business therein make it certain that, when he altered the cheque so as to transfer Chunni Kuar's Rs. 500, he knew that her subsequent application for payment of the same would be delayed if not defeated. If he knew that, this would be the result he intended

[EDGE, C. J.—I do not think that was his intention. I think that the possible loss to Chunni Kuar was not in his mind at all at the time when he altered the cheque. His intention was merely to conceal the fraud which had already been committed in the payment of Sewa Ram's Rs. 500 to other persons. That is not the kind of intention which s. 465 refers to]

That no doubt was also his intention, but a more immediate intention is not inconsistent with a more remote one. He in fact intended both results. He must have expected both consequences as necessarily resulting from his acts, and intention is nothing more than the expectation of particular consequences at the moment of action "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct."—Stephen's *History of the Criminal Law*, vol. ii, p. 111. This agrees with Austin's analysis of "intention," which has been generally accepted. No doubt a common notion prevails that there is something more in intention than the expectation of consequences at the moment of action. This, however, is not correct.

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[EDGE, C. J —The question is always one of the evidence in the particular case. I think you should distinguish between what a man would have in his mind if he adverted to the matter, and what he actually has in his mind. If the appellant had adverted to the matter, he probably must have known that his act would lead to delay in the payment of Chunni Kuar's money to her, but you must show that this consequence was actually in his mind, and was the actual intention with which he acted. No jury would find that the appellant intended to cause loss to Chunni Kuar.]

It must be presumed not only that the appellant knew what were the natural consequences of his act, but also that what he knew was present to his mind. The nature of the presumption of an "intent to defraud" in cases of forgery is shown in Stephen's *Digest of the Criminal Law*, art 355. This intent is not disproved by showing that the principal object of the prisoner was his own or some other person's advantage, and not loss to the prosecutor. It is proved by showing that he intended "to deceive in such a manner as to expose any person to loss or the risk of loss"—Stephen's *History of the Criminal Law*, vol. iii, p 187. See also vol. ii, p 122.

[EDGE, C J —With great respect for Mr. Justice Stephen, I do not remember any case in which his *History* has been cited in a Court of Justice.]

It was cited as an authority in *Queen* v. *Dudley and Stephens* (1) before the Court for Crown Cases Reserved, both in the argument and in the judgment.

The cases referred to on the other side are distinguishable. In most of them there were not sufficient grounds for supposing that there was any knowledge on the prisoner's part that loss or risk of loss was a probable result. They prove only that mere deceit is not fraud.

The conviction under s. 218 is also good. *Queen-Empress* v. *Parmeshar Dat* (2) applies.

[EDGE, C.J.—You need not argue that point.]

Bábu *Jogindro Nath Chaudhri*, in reply.

(1) L.R, 14 Q. B. D. 273. (2) *Ante*, p. 201.

EDGE, C.J.—The prisoner in this case has been convicted of offences described in two sections of the Indian Penal Code, namely, s. 465 and s. 218. Against these convictions he has preferred this appeal, and in order to deal with the same, it will be convenient if I deal first with the conviction under s. 465 for forgery. It appears to me that the offence, if committed, comes under the third clause of s. 464 of the Penal Code. It is clear that an offence under s. 464 cannot be made out unless the act was dishonestly or fraudulently done; and in order to see how these words are to be construed, it is necessary to refer to ss. 24 and 25 of the Indian Penal Code. S. 24 defines the word "dishonestly" as follows:—"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." S. 25 in like manner defines "fraudulently" thus:—"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Here, in the arguments which have been addressed to me, it has not been suggested that the prisoner made the alterations in the cheque to cause wrongful gain to any one, but it is contended that he did it to cause wrongful loss.

Mr. *Strachey*, the acting Government Prosecutor, contends that the prisoner's intention was to cause wrongful loss to Musammat Chunni Kuar by delaying the payment of the Rs. 500 due to her. The question of intention is one for a jury or for a Judge sitting as a jury. Of two probable intentions, the one immediate and more probable and the other remote and less probable, I do not think we should attribute to the prisoner the remoter intention.

In my opinion his intention was to conceal a fraud which had been previously committed. A sum of Rs. 500, due to Sewa Ram, and after his death to his representative, had been fraudulently withdrawn. Sewa Ram's representative had applied for payment, and it became an immediate consideration how to provide for this Rs. 500. The only way was to have another Rs. 500 ready. We find that two reports (which will be referred to presently), dated the 25th April and 3rd August, 1885, represented that Sewa Ram's money was in deposit. Ought I to infer from this that Girdhari

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Lal's object and intention was to cause wrongful loss to Musammat Chunni Kuar? No doubt had the amount of the cheque been paid to Sewa Ram's representative, it would probably have caused a loss to her by causing the payment to her to be delayed. I cannot conceive that that was his intention. The intention was to stave off the evil day when the fraudulent withdrawal of Sewa Ram's money should be found out. That is not the intention referred to in s. 24. Although the act might have caused loss, the intention in reference to this cheque was to meet the claim of the representative of Sewa Ram. Under these circumstances, in my opinion, it cannot be said that the prisoner acted "dishonestly" within the meaning of s. 24. Then did he act "fraudulently" within the meaning of s. 25? He may have known that the probable consequence of his act would be to delay payment of the money due to Musammat Chunni Kuar, but it cannot be said that his intention was to defraud. Any loss that the Government could sustain had already been sustained by the fraudulent withdrawal of Sewa Ram's money. S. 464 of the Penal Code, therefore, which may be read as part of s. 465 under which the prisoner has been convicted, is not made out; and I must allow the appeal in this respect, and so far set aside the conviction and sentence.

Now we come to the other part of this case, namely, the prisoner's conviction and sentence in respect of the second and third charges under s. 218 of the Penal Code. This section reads as follows:—"Whoever, being a public servant, and being, as such public servant, charged with the preparation of any record or other writing frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public, or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, &c."

The first argument addressed to me by Pandit *Ajudhia Nath* for the prisoner was that this section did not apply, because he contended the prisoner Girdhari Lal did not frame the writing, the subject of the charge, "as such public servant." Now we find the prisoner, who was a public servant in fact, making these

two reports, and assuming to make them in due course and as a part of his duty; and, in fact holding out these reports as reports which were made by the proper officer. There is also the fact that when the two witnesses from the office were being examined, no question was put to them which suggested that it was not the prisoner's business to make these reports. From all this I am bound to infer that the prisoner made the reports because it was his business to do so; and as nothing was elicited from the two witnesses to the contrary, I hold there was evidence that he made these two reports as a public servant within the meaning of s. 218.

It is then urged that, allowing that he made these false reports as a public servant, he did not make them with intent to cause loss. How far this contention can avail the prisoner will be seen. When Sewa Ram's representative applied to have the sum standing to his credit paid, there was an officer of the Government Treasury to whom the prisoner was subordinate named Jainti Prasad. This officer called for a report, and Girdhari Lal made the first of these reports to the effect that there was a sum of Rs. 500 standing to the credit of Sewa Ram. The report is dated the 25th April, 1885. The two witnesses above referred to were asked what the report meant, and they said that it meant that this sum stood in deposit to Sewa Ram's credit, and Girdhari Lal did not say at his trial, though every opportunity was given him, that the report had any other meaning. It is only here that it is suggested that the report does not mean what until now it has been taken to mean. Was it a false report, or was it incorrect, to his knowledge? It is asserted that he looked at one side of the account only, and therefore reported incorrectly: but for myself I do not believe he was misled. With what intention then did he make that report? If he had had no intention to defraud or deceive any one, he could, within a week, have caused Musammat Chunni Kuar's money to be transferred to the Civil Court deposit, instead of waiting until the Treasury Officer, Babu Jainti Prasad, had returned to his duties. Now Jainti Prasad was not a person, as it appears to me, who looked carefully into the papers put before him. He left on the 28th April, and returned to his duties on the 28th July, 1885. His place was filled during that time

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by another officer. The cheque, which was prepared on the 28th April, was not put before the officiating officer. Instead of putting it before this officer, Girdhari Lal waits; and why does he do that? The reason for delay no doubt was because the prisoner knew that Babu Jainti Prasad was a person who did not carefully look at the papers he signed. Does not this show intention? In August, 1885, he makes another incorrect report. He again reported that Sewa Ram's money was in deposit. He must have had some intention; and now what was his intention? I have no moral doubt that what he wanted and what was in his mind was to stave off the evil day of the discovery of the previous fraud, and to save himself or the actual perpetrator of that fraud from legal punishment, and for that purpose and with that intention he made these false reports. I come to the conclusion therefore that the prisoner did frame those reports in a manner which he knew to be incorrect, with intent within the meaning of s. 218 of the Penal Code.

It only remains to consider whether the punishment awarded by the lower Court for the two offences under s. 218 is sufficient. I think not. The Sessions Judge has convicted the prisoner of three charges. The conviction and sentence for forgery has been quashed here, and the convictions under s. 218 of the Code sustained.

The Sessions Judge passed two sentences of three months' rigorous imprisonment in respect of the latter offences. If I allow these sentences to stand, they would not, in my opinion, adequately represent the punishment that should be awarded for these two offences of which the prisoner has been found guilty. It has been very ably urged by the prisoner's junior counsel, Babu *Jogindro Nath Chaudhri*, that I ought to consider his youth, his loss of all chance of future Government employment, and the time that this case has been under investigation. I do not know what the prisoner's age may actually be. His age, as shown on the record, was 29 years, and he was apparently of sufficient age to be intrusted with the duty of an accountant, and as to the argument of loss of employment and loss of social position, it is sufficient to say that had Girdhari Lal not been of good character he would not have been employed and trusted by his superiors as he is

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shown to have been, and would not have had the opportunity of perpetrating the offences. Under these circumstances the sentences passed by the lower Court in respect of the second and third charges must be increased as follows:—Six months' rigorous imprisonment and a fine of Rs. 500 in respect of the second charge and conviction; in default of payment of the fine, six months' rigorous imprisonment in addition. In respect of the third charge, six months' rigorous imprisonment to commence at the expiry of the sentence in respect of the second charge. This will make altogether twelve months' rigorous imprisonment and Rs. 500 fine, and in default of payment of the fine, six months' rigorous imprisonment in addition.

Before Sir John Edge, Kt., Chief Justice.

1886 *August* 30.

QUEEN-EMPRESS *v.* KHARGA AND OTHERS.

Sessions Court—Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code, ss. 28, 226, 236, 237, 537.

Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

Three persons were jointly committed for trial before the Court of Session two of them being charged with culpable homicide not amounting to murder of *J*, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to *C*, and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*.

Held that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

Held also that the Sessions Judge had power, under s. 28 of the Code, to try the charge, assuming that he had power to add it.

THESE were appeals from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 23rd June, 1886, convicting the appel-

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lants, Kharga and Kuar Sen, of culpable homicide not amounting to murder and of causing hurt, and Nanhua of abetment of the former offence and of causing hurt.

Kharga, Kuar Sen, and Nanhua were jointly committed for trial before the Sessions Judge—Kharga and Kuar Sen charged with culpable homicide not amounting to murder of one Jaisukh, and Nanhua with the abetment of that offence. At the trial the Sessions Judge added a charge against all the appellants of causing hurt to one Chiddu, and he convicted them of the charges on which they were committed and on the charge which he added.

The main facts of the case, as found by the Sessions Judge, were as follows:—The deceased Jaisukh and the three appellants were near relatives, living in houses opening into a common courtyard. The deceased Jaisukh, his brother Chiddu, his cousin Nanhua, and some other *Kachis*, had gone to a wedding feast at a place about two miles from their home. On the way back there was some jesting about Nanhua having over-eaten himself and having been sick. When Jaisukh and his brother got home, the former told his own wife and Nanhua's wife the jest against Nanhua. On Nanhua's coming home his wife repeated the jest, and gave Jaisukh as her authority. Jaisukh came in about the time, and the dispute between the two resulted in Jaisukh being knocked down by a blow, which killed him. It appeared that Nanhua laid hold of Jaisukh's hands, and upon some abuse by Nanhua, Nanhua's brother Kharga hit Jaisukh over the head with the side-piece of a charpai, and Kuar Sen struck him also on the head with the end-piece of a charpai Upon this Chiddu came down from the roof and was struck on the head by Kharga, and thrown down by Nanhua and Kuar Sen. Jaisukh died from the effect of the blows.

It was contended on behalf of the appellants that the Sessions Judge had no power to add the charge of causing hurt to Chiddu, or try them on that charge, and the convictions on that charge were therefore illegal.

Bábu *Baroda Prasad Ghose*, for the appellants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

EDGE, C. J.—The appellants here have been convicted under ss. 304 and $\frac{304}{109}$ of the Indian Penal Code, and they have also been convicted of an offence under s. 323 of the same Code. They were committed to the Sessions Court—Kharga and Kuar Sen under s. 304 and Nanhua under ss. $\frac{304}{109}$, but at the trial the Judge added the charge under s. 323, in respect of an assault upon a man called Chiddu. This assault took place at the same time as, or at any rate immediately after, the attack which resulted in the death of Jaisukh. It was objected, both here and in the Sessions Court, that the Sessions Judge had no power to add the charge under s. 323; and it is further argued that even if he had such power, he had no power to try such a charge. The first objection is met by the Government Pleader by referring to s. 226, Criminal Procedure Code, under which section he argues the Sessions Judge would be empowered to add such a charge. I very much doubt whether, under the circumstances, the Judge had power to add this charge under s. 323. In this case the prisoners were not committed "without a charge," for they were sent up on a charge on which they have been actually convicted. Nor can it be said that the charge was an "imperfect" charge, for it disclosed a separate offence. Nor yet is it an "erroneous" charge, for the evidence shows that the offence, as charged, was established. I therefore consider that this case does not come within the terms of s. 226 of the Criminal Procedure Code, and I consider that the adding of this charge was an irregularity in the proceedings. I do not think that it is covered by ss. 236 and 237 of the same Code. Those sections apply to a different state of things entirely. As to the second point taken in argument, I am of opinion that the Sessions Judge had power, under s. 28 of the Criminal Procedure Code, to try the charge, supposing he had power to add it. This section is a general section, which, subject to the other provisions of the Code, gives power to the High Court and the Court of Session to try any offence under the Indian Penal Code; and it also enacts that any offence under the Indian Penal Code may be tried "by any other Court by which such offence is shown in the eighth column of the second schedule to be triable." The provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Now, if it

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could be shown to me that the action of the Sessions Judge had caused a failure of justice and had prejudiced the accused in their defence, I should without hesitation set aside so much of the proceedings as related to the charge under s. 323. That a party might in some cases be so prejudiced is quite clear; but in this particular case the Sessions Judge was addressed by the gentleman who appeared for the prisoners, and he heard all the objections raised, and if the pleader had so desired, he might have called fresh witnesses as to this charge. This being so, I do not think that the objections now urged are of sufficient weight, and I consider that the provisions of s. 537 of the Code meet the case. As to the merits, I am of opinion that there is ample evidence to support the findings, and I do not see how the Judge could have come to any other conclusion than that the men were guilty. The appeals are dismissed.

Appeals dismissed.

CRIMINAL REVISIONAL.

1886 *September* 20.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.

Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness—Criminal Procedure Code, ss 291, 540.

Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector

applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it.

Held that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

Per STRAIGHT J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

THIS was an application for revision of an order passed by Mr. W. Martin, Sessions Judge of Mirzapur, on the 11th September, 1886, directing the Deputy Magistrate to summon the applicant, the Rajah of Kantit, as a witness in a case committed for trial before the Sessions Judge.

The applicant stated in his application as follows :—

"1. That on the 24th August, 1886, certain persons, Lallu Singh, Sheo Singh, and others, were committed by the Deputy Magistrate of Mirzapur for trial by the Court of Session upon charges under ss. 147, 436, and $\frac{436}{114}$ of the Penal Code.

"2. That under s. 211 of the Criminal Procedure Code, the said Lallu Singh and Sheo Singh each gave in a written list of the persons whom they wished to be summoned to give evidence at the trial, and that on each of the said lists the name of your petitioner was entered.

"3. That on the 24th August, 1886, a petition was filed in the Court of the Deputy Magistrate on behalf of your petitioner, under s. 216 of the Criminal Procedure Code, objecting to the summoning of your petitioner on the ground that his name had been entered in the said lists for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material.

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"4. That on the same date the Deputy Magistrate passed an order, requiring the said Lallu Singh and Sheo Singh to satisfy him that there were reasonable grounds for believing that your petitioner's evidence was material, and on the 25th August, having heard arguments on both sides, passed an order refusing to summon your petitioner.

"5. That on the 2nd September, an application was filed on behalf of the said Lallu Singh and Sheo Singh in the Court of the Sessions Judge of Mirzapur, praying that your petitioner might be 'summoned to give evidence for the defence,' and stating generally that his evidence was 'important,' but setting forth no grounds for the belief that it was material.

"6. That on the 11th September the Sessions Judge passed an order, directing that a copy of the application should 'be sent to the Criminal Court in order to summon Rajah Bhupendra Bahadur Singh as a witness,' and in pursuance of this order a summons has been served upon your petitioner by the Deputy Magistrate.

"7. That the above-mentioned order of the Sessions Judge assigns no reason for reversing the decision of the Deputy Magistrate, and was passed in the absence of your petitioner, and of any person representing him, and without any notice being issued to him, or other opportunity afforded to him of showing cause against the passing of such order.

"8. That the trial in the Court of Session has not yet begun, and the 21st September, 1886, is fixed for its commencement.

"9. That under the circumstances above set forth, your petitioner humbly submits that the Sessions Judge had no jurisdiction to make the above-mentioned order of the 11th September, 1886.

"10. That for the reasons contained in the affidavits hereto annexed, your petitioner believes that the inclusion of his name among the witnesses desired to be summoned is purely vexatious, and that no evidence which he could give would be material to the case.

"11. Your petitioner therefore prays that this Hon'ble Court may be pleased to set aside the Sessions Judge's order of the 11th September, 1886, and to exempt him from appearing under the summons issued in pursuance thereof."

Mr. *A. Strachey*, for the petitioner.

EDGE, C. J.—I am of opinion that this application must be dismissed. I am not satisfied that the Sessions Judge did not act within his powers in passing the order he did. Under s. 216 of the Criminal Procedure Code, a Magistrate is not entitled to require an accused to satisfy him, the Magistrate, that there are reasonable grounds for believing that the evidence of a witness, whom the accused desires to be summoned and be included in the list, is material, unless the Magistrates think that such witness "is included in the list for the purpose of vexation or delay, or of defeating the ends of justice." When a Magistrate does refuse under this section to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material. The only ground stated by the Magistrate for refusing to summon the witness appears, from the uncertified copy of the Magistrate's order before me, to be that he thought the reasons assigned for the application to have the Rajah summoned as one of the defendant's witnesses were insufficient. This does not show that the Rajah's evidence was not material. Even if I thought the Sessions Judge had not jurisdiction to make the order complained of, which I do not, I should not interfere in this case. I think it desirable that it should be generally understood that these objections to appearing to give evidence in a Criminal Court cannot be entertained. It is the duty—and it should be a cheerful duty—of every one to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of an accused.

STRAIGHT, J.—I am of the same opinion. It appears that the Sessions Judge, having to try certain persons committed by the Magistrate, and having been satisfied that the Rajah of Kantit was a material witness for the defence, ordered the Magistrate to summon him as a witness, and a summons was issued to that distinguished personage. I think the order of the Judge was right. The suggestion of the learned counsel for the applicant, that s. 540 alone confers powers on a Sessions Judge, appears to me an incorrect contention, and I am not prepared to adopt it; for to lay down any such rule might lead to great inconvenience and possible injustice to accused persons. It is clear to my mind, under s. 291 of the

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Criminal Procedure Code, that though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of "right," yet that the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. It is impossible for me to say, upon the affidavits before me, that the Rajah will not be a material witness to the defendant's case, and though it may be distasteful and unpleasant to him to appear as a witness in a Criminal Court, it is his duty, as one of Her Majesty's subjects, living under the protection of the law, to obey that law, and attend before the Judge in obedience to the summons. I have no doubt the Judge will make every arrangement to make such attendance as convenient and unobjectionable as is possible and consistent with the interests of the accused.

Application rejected.

APPELLATE CRIMINAL.

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September 21.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

QUEEN-EMPRESS *v.* ISHRI SINGH.

Criminal Procedure Code, s. 512— Act I of 1872 (Evidence Act), ss. 33, 157— Witness, threatening—Duty of Magistrate.

In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

Held that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

Held, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code.

Per STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

In cross-examination before the Court of Session, a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody."

Held that if the Magistrate did so address the witness, he exceeded his duty.

THIS was an appeal from an order of Mr. J. C. Leupolt, Sessions Judge of the Bijnor-Budaun Division, dated the 18th August, 1886, convicting the appellant of murder and sentencing him to death.

The facts of the case appeared to be as follows:—

On the 19th March, 1874, one Fakir Chand was murdered at Gohta, in the Budaun district, and six persons, named Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh, were accused of the offence. Of these, all except Ishri Singh, who had absconded, were arrested and, after an inquiry by the Magistrate of the District, were committed for trial by the Court of Session by which they were convicted. Among the witnesses examined both before the committing Magistrate and the Court of Session were Musammat Durga, Musammat Chittan, Shera, Imami, and Kanhai Lal, and before the committing Magistrate Dr. Ruttledge, Civil Surgeon. The deposition of the last named was dated the 2nd April, 1874, and he deposed to having examined the dead body of Fakir Chand and to the injuries which he found thereon. The deposition of Musammat Durga before the Court of Session was dated the 29th April, 1874. The depositions of Musammat Chittan, Shera, Imami, and Kanhai Lal before the committing Magistrate, who examined each of them on three different occasions, were dated in March, 1874, and before the Court of Session the 29th April, 1874. Musammat Durga and Musammat Chittan deposed to Ishri Singh having taken part in the murder with Pahlad Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh. Shera deposed to seeing Pahlad Singh, Moti Singh, Umrao Singh, Mansukh, and a man

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whose name he did not know, but whom he could identify, striking Fakir Chand. Imami deposed to have seen two men, whose faces were covered with cloth, running away in an easterly direction from the place where Fakir Chand had fallen down, and a little way behind them Umrao Singh also running in the same direction, and to have also seen Moti Singh, Fauji, and Mansukh running from the same place in a westerly direction. Kanhai Lal, son of Fakir Chand, deposed to have arrived on the spot while his father was still alive, but insensible, and to have heard at that time from Chittan and Shera that Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh were the murderers.

In May, 1886, the appellant was produced before the Magistrate of the District, and was subsequently committed for trial by the Court of Session for the murder of Fakir Chand. He denied that he was the Ishri Singh who had been accused of being concerned in that offence.

The Sessions Judge, referring to s. 33 of the Evidence Act (I of 1872), admitted in evidence against the appellant the depositions mentioned above of Chittan, Shera, Imami, and Kanhai Lal, who were all dead. He also admitted in evidence, with reference to the same section, the deposition of Dr. Ruttledge mentioned above. He also admitted in evidence the deposition of Musammat Durga before the Court of Session in April, 1874, apparently in order to corroborate her testimony against the appellant in this case. He convicted the appellant and sentenced him to death.

The appellant was not represented.

The *Offg. Public Prosecutor* (Mr. *A. Strachey*), for the Crown.

EDGE, C. J.—In this case I am of opinion that on the evidence of Musammat Durga and that contained in the deposition of Musammat Chittan taken before the Magistrate, there can be no doubt that one Ishri Singh took part in the murder of Fakir Chand, deceased. I have also no doubt on the evidence that the Ishri Singh who took part in the murder of Fakir Chand is the prisoner who has now been convicted.

Besides Musammat Durga, Lal Singh, who says he knew him for 20 years, Sita Ram, *Ahir*, who knew him for 12 or 13

years, Ganga *Brahman*, who says he taught him fencing—all speak to his identity. This is enough to say in reference to the appeal of the prisoner, which is dismissed and the conviction affirmed. As regards the sentence, considering the time that has elapsed, I think the ends of justice will be sufficiently met by reducing the sentence to one of transportation for life.

I have a few words to add regarding the proceedings and the evidence admitted in the case. It is said by Musammat Durga that the Magistrate, addressing her, said:—"Recollect, or else I will send you into custody." Her statement in this respect may be true or false. If the Magistrate did speak to the Musammat in this manner, he exceeded his duty. It is the duty of a Magistrate to protect a witness from coercion of that kind.

With regard to the depositions of the witnesses who were examined before the Magistrate in 1874, and who were proved to have died, I am clearly of opinion that these depositions were not admissible under s. 33 of the Evidence Act. In order to be admissible under that section, the proceedings in which the same evidence was given must have been between the parties or their representatives in interest, and the person against whom such depositions could be heard must have had an opportunity of cross-examining the witnesses.

Now the accused was not present when the evidence was given, nor was he a party to that proceeding. Does s. 512 of the Criminal Procedure Code make it admissible? The evidence of Musammat Chittan did come within the terms of the section, because we find it recorded by the Magistrate that the accused Ishri Singh was an absconder, and the Magistrate did record the depositions of the witnesses, and he was a Magistrate who was competent to try or commit for trial such absconder, if he had been present, for the offence complained of; and consequently, in my opinion, the deposition of Musammat Chittan before the Magistrate came within the terms of s. 512, and was admissible against the accused. As to the evidence given at the time before the Judge, that evidence was not taken as evidence against the absconder. It was recorded against the persons then being tried. Excluding, therefore, this inadmissible evidence, there is, as I have already point-

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ed out, ample evidence that the prisoner was one of those who took part in the murder of Fakir Chand in 1874.

STRAIGHT, J.—I am anxious to state the facts in this case which lead me to the same conclusion as the learned Chief Justice.

On the 19th March, 1874, one Fakir Chand was undoubtedly murdered by some persons, and shortly after the murder, the parties who were named as the perpetrators were six individuals, namely—(1) Pahlad Singh, (2) Ishri Singh, (3) Moti Singh, (4) Umrao Singh, (5) Fauji Singh, (6) Mansukh *Chamar*. Five of these persons, namely, Nos. (1), (3), (4), (5), and (6), were at once arrested, and taken before the Magistrate who held the inquiry, and on the 2nd April, 1874, these were all committed for trial to the Sessions Court. Nos. (1), (3), (4), and (6), were subsequently convicted and hanged, while Fauji escaped with a sentence of transportation for life. At the time of the inquiry before the Magistrate, the person named as Ishri Singh absconded, as was then proved, and through the proceedings in that officer's Court, he was distinctly mentioned as one of the participators in the crime charged against the others, and the statements of the witnesses to that effect were, as the depositions show, fully recorded. I therefore do not think it will be placing a strained interpretation on the language of s. 512 of the present Criminal Procedure Code, read in conjunction with s. 327 of the old Act, to hold that, *quâ* Ishri Singh, those depositions were recorded for the purposes and within the meaning of that provision of the law, and were admissible at the trial out of which the appeal before us arises. I quite agree with the learned Chief Justice, however, in the limitation he would impose, by which he would exclude the evidence given in the sessions trial of 1874, as under the circumstances being inadmissible in the present case, though I am by no means prepared to say that such a limitation would invariably apply. It is clear that the Judge, from whose decision the appeal before us is preferred, was in error in receiving the depositions taken in the former proceedings under s. 33 of the Evidence Act as proof on the trial held by him, and he either did not carefully read the section in conjunction with the provisos, or, if he did, he failed to understand its meaning. The appellant was no party to the former proceedings, and he had no

opportunity of cross-examining the witnesses, which circumstances removed the case from the operation of s. 33. But, as I have said, s. 512 of the present Criminal Procedure Code, taken in conjunction with s. 327 of the old law, meets the difficulty, and at least made the deposition of Musammat Chittan evidence at the trial. I also think that, under the special circumstances, the deposition of Musammat Durga, taken in 1874, was admissible, in advertence to the terms of s. 157 of the Evidence Act. I agree with the Chief Justice that there was good evidence before the Judge to show, first, that Ishri Singh was one of the persons who took part in the violence that led to the death of Fakir Chand, and secondly, that the appellant is that Ishri Singh. I concur therefore in dismissing his appeal, as also in the mitigation of the sentence to one of transportation for life. I can only add that if the statement of the girl Durga in the Court below, in cross-examination, as to the action of the committing Magistrate, is correct, the conduct of that officer was not only most improper, but absolutely illegal, and a repetition of it will involve very serious consequences.

CRIMINAL REVISIONAL.

1886 *September* 25.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* YUSUF KHAN.

Act XV of 1883 (*N.-W. P. and Oudh Municipalities Act*), *ss.* 69, 71—*Municipal rules—Infringement of rules—Prosecutions—N.-W. P. Government Notification No.* 865, *dated the* 3*rd November*, 1869—*Rule VI, legality of.*

Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner

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in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

Held that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

Held that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

THIS was an application for revision of an order of Mr. J. Clarke, Deputy Magistrate, Bulandshahr, dated the 2nd April, 1886, and of the order of Mr. H. G. Pearse, Sessions Judge of Meerut, dated the 12th May, 1886, affirming the Deputy Magistrate's order.

It appeared that Mr. Addis, Magistrate of the Bulandshahr District, having, as Chairman of the Municipal Board of Bulandshahr, received information from one Chintaman that the applicant, Yusuf Khan, had evaded the payment of octroi duty on certain cloth at Bulandshahr, directed the Tahsildar to report in the matter. On receiving the Tahsildar's report, the Magistrate made the following order:—"I think that the case against Yusuf Khan should be investigated criminally for breach of Municipal law. It is obviously unfitting that I should conduct the inquiry myself, as I am Chairman of the Board. I therefore make over the case to Mr. Clarke, Deputy Magistrate."

The Deputy Magistrate accordingly tried Yusuf Khan for evading the payment of octroi duty, under a rule made by the Lieutenant-Governor of the North-Western Provinces under s. 12 of Act VI of 1868—(Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869), read with s. 45, Act XV of 1873, and convicted and punished him with a fine of Rs. 50.

That rule runs as follows :—"Any person evading or abetting the evasion of the octroi duties imposed in the schedule, shall be deemed to have committed an infringement of a bye-law."

Yusuf Khan having applied to the Sessions Judge of Meerut for revision of the order of the Deputy Magistrate, the Sessions Judge rejected the application, but modified the conviction so as to make it one under the rule quoted, read with s. 71 of Act XV of 1883.

It was contended before the Sessions Judge that the Deputy Magistrate acted contrary to law in taking cognizance of the offence, as there had been no complaint by the Municipal Board or any person authorized by the Board in that behalf as required by s. 69 of Act XV of 1883. As to this contention the Sessions Judge observed as follows :—

"In the absence of any definite rule as to who is to be considered a 'person authorized by the Board' under s. 69 of Act XV of 1883, this Court considers that on every assumption of common sense the President must be considered such a person. The alternative would be the deadlock of every minor prosecution for breaches of Municipal rules, standing over it might be for a month till the meeting of the Board for a solemn consideration and sanction by the whole collective wisdom."

Mr. *G. T. Spankie*, for the applicant, contended that the rule, with reference to which the applicant had been convicted, was not legally made under s. 12 of Act VI of 1868, that section only authorizing the Lieutenant-Governor to make rules as to the persons by whom, and the manner in which, any assessment of taxes should be confirmed, and for the collection of such taxes, and the rule in question was not such a rule ; and being illegal that it was not saved by Act XV of 1873, s. 2. It was also contended that the Deputy Magistrate had no jurisdiction, as no complaint had been preferred by the Municipal Board or any person authorised by it in that behalf, within the meaning of s. 69 of Act XV of 1883.

The *Offg. Public Prosecutor* (Mr. *A. Strachey*), for the Crown, contended that the rule under which the applicant had been convicted might reasonably be considered a rule relating to the collection of taxes, within the meaning of s. 12 of Act VI of 1868. Even if it could not be so construed, and was consequently invalid in

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its inception, s. 2 of Act XV of 1873, confirmed and legalized all rules whatever theretofore made and approved by the Local Government, irrespective of their validity or otherwise, under Act VI of 1868. The rule must therefore be regarded as thenceforth a rule "made under the North-Western Provinces and Oudh Municipalities Act of 1873," within the meaning of s. 71 of Act XV of 1883, and consequently must be deemed to have been made under the latter Act, and to continue in force until repealed by new rules made thereunder. The conviction was therefore good under s. 64 of Act XV of 1883. Upon the question of jurisdiction, he submitted that the objection should be treated upon the same principle as objections on the ground of a defective sanction to prosecute, and that the conviction should not be set aside, unless it could be shown that there had been a failure of justice.

STRAIGHT, J.—Assuming the rule, in advertence to which the conviction of the petitioner was had, to have been legally made under s. 12 of Act VI of 1868, which is far from clear, and that it was saved by Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883, continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act. Its operation was therefore, in my opinion, subject to the provisions of Act XV of 1883; and among them, to that contained in s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. It is not pretended or suggested that the Magistrate of the District acted other than entirely of his own motion and authority in causing proceedings to be taken against the petitioner, which he had no right to do; and, for aught that appears to the contrary, every other member of the Board never so much as heard that a prosecution was to be instituted. The words of s. 69 are mandatory, and as the petitioner from the outset urged this objection to the legality of the proceedings, I think he is entitled to the benefit of it now. The position of the Magistrate of the District in connection with the terms of s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more "*locus standi*" to cause a prosecution to be instituted personally than

any other individual member. The Judge's remarks on this point are quite erroneous and very misleading. It is as well that Municipal Boards and the Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 are satisfied. Those rules encroach on the ordinary rights of the public, and where their enforcement is directed by the statute to be attended by a certain safeguard, that safe-guard must be respected and observed.

The conviction of the petitioner is quashed, and the fine will be refunded.

Conviction set aside.

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ABETMENT OF MAKING AN UNSTAMPED RECEIPT. *See* Act XLV of 1860, s 107

ACCOMPLICE - *Evidence—Corroboration*] Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice *Empress* v *Ram Saran* referred to.

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——————————*Act I of* 1872, *ss* 114 (*b*), 133] The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*, but experience shows that it is unsafe, and hence it is the practice of the Judges both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one, but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R* v *Webb*, *R* v. *Dyke*, *R* v *Addis*, and *R.* v. *Wilkes* referred to.

The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder, though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

In the trial of *R*, *S*, and *M* upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P*, who was jointly tried with them for the same offence, (ii) the evidence of an accomplice; (iii) the evidence of witnesses who deposed to the discovery in *R's* house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found

Held, that there was no sufficient corroboration of the statements of the accomplice or of the co confessing prisoner *P*.

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——————*Corroboration—Dacoity—Possession of stolen property*] Criminal Courts dealing with an approver's evidence in a case where several persons are charged, should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen Empress* v *Ram Saran*, *Queen-Empress* v. *Kure* and *Reg* v. *Mullins* referred to

A, *B*, *M* *R* and *N* were tried together on a charge under s 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against *A*, *B* and *M* there was the further

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evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to *R*, it was proved that he was present when *B* pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it.

Held, with reference to *A*, *B* and *M*, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to those particular persons.

Held that inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on *R's* part, and, with regard to *N*, no property was found with him or produced through his instrumentality, both *R* and *N* ought to have been acquitted.

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ACTS—1855—XXVIII—*Regulation XXXIV of* 1803, *ss.* 9, 10. *See* Mortgage 8

——— 1856—XV. *See* Hindu widow 2.

——— 1860—XLV, s. 21—*Public servant.*] Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant" within the definition contained in s. 21 of the Penal Code.

Queen-Empress *v.* Parmeshar Dat 201

——— ——— ss. 24, 25—*Act XLV of* 1860, *s.* 218—*Forgery—"Dishonestly"—"Fraudulently"—Public servant framing incorrect record.*] A Treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs 500, which was in the treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was about to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to.

Held, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs. 500 due to her, though the act might have caused her loss but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500, that under these circumstances he could not

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be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s 465 had not been made out, and the conviction under that section must be set aside.

Held also, that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code.

Held further, that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code.

Queen-Empress *v.* Girdhari Lal 653

ACTS—1860—XLV, s. 99. *See* s. 353.

——— ———s. 107—*Act I of* 1879 (*Stamp Act*), *s* 61—*Abetment of making an unstamped receipt*] A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto.

Held that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress* v. *Bahadur Singh* distinguished; *Empress* v. *Janki* and *Empress* v *Bhairon* referred to

Queen-Empress *v.* Mitthu Lal 18

——— ———s. 182—*Prosecution under s* 182—*Criminal Procedure Code, s.* 195] A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen-Empress* v *Radha Kishan* overruled

Where a specific false charge is made, the proper section for proceedings to be adopted under is s. 211 of the Penal Code.

Queen-Empress *v.* Jugal Kishore 382

——— ———s 189—*Threat of injury to public servant—Necessity of proving actual words used*] In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner The Sessions Judge, on appeal, affirmed the conviction observing that it was immaterial what the words used were, and that the intention and effect of the words were plain.

Held that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether, in fact, a threat of injury to the public servant was really made by the accused.

Queen Empress *v.* Maheshri Bakhsh Singh 380

——— ———s. 201] S. 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the case of a person who screens the principal or actual offender. *Queen* v. *Ram Soonder Shootar, Reg.* v. *Kashinath Dinkar, Empress* v *Kishna, Empress* v. *Behala Bibi*, and *Queen-Empress* v. *Lalli*, referred to.

Queen-Empress *v.* Dungar 252

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ACTS—1860—XLV, s. 211—*Prosecution for making a false charge—Opportunity to accused to prove the truth of charge—Criminal Procedure Code, s.* 195.] A complaint of offences under ss. 323 and 379 of the Penal Code was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code.

Held, that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government* v. *Karimdad* referred to.

Queen-Empress *v.* Ganga Ram 38

———————, s. 218. *See* ss. 24, 25.

——— s. 291—*Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue—Criminal Procedure Code, ss.* 134, 143, 144, *sch.* v. *Form* 20.] To support a conviction under s. 291 of the Penal Code there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person.

A Magistrate's powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code, Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *exparte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144 of the Code, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.

Queen-Empress *v.* Jokhu 99

——— s. 300, EXCEPTION 1. *See* Murder 1, 2.

——— s. 302—*Grave and sudden provocation.* *See* Murder 1, 2.

——— s 304—*Grave and sudden provocation.* *See* Murder 1, 2.

——— s. 353—*Act XLV of* 1860, *s.* 99 —— *Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code, ss* 2, 251—*Right of private defence.*] A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s 353 of the Penal Code had been committed.

Held, that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant.

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Held also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence.

Queen-Empress *v* Janki Prasad 293

ACTS—1860—XLV, s. 403. *See* s. 411.

——— s 410. *See* s 411.

——— s 411—*Animal "nullius proprietas"—Bull set at large in accordance with Hindu religious usage—Appropriation of bull—Act XLV of 1860, ss. 403, 410.*] A person was convicted and sentenced under s 411 of the Indian Penal Code for dishonestly receiving a bull knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies.

Held, that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore "*nullius proprietas*," and incapable of larceny being committed in respect of it; and that the conviction must be set aside.

Queen-Empress *v.* Bandhu 51

——— ——— s 417. *See* Attempt to cheat.

——— ——— ss 459, 460.] Ss. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly, and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.

Queen-Empress *v.* Ismail Khan 649

——— ——— s. 464, clause 3. *See* ss 24, 25.

——— ——— s. 511. *See* Attempt to cheat.

——— 1861—IX, s. 5. *See* Muhammadan Law 3.

——— 1863—XX, ss. 14, 15, 18. *See* Suit for declaration that property is *wakf*.

——— 1870—VII—*Statute, construction of.* *See* Mortgage 3.

——— ——— s. 7, Art. IX. *See* Mortgage 3.

——— ——— s. 10—*Dismissal of suit under cl.* ii. *See* Civil Procedure Code, s. 13.

——— ——— XIV—*Regulation XXXIV of* 1803, *ss.* 9, 10. *See* Mortgage 8.

——— 1871—VI, s. 20. *See* Mortgage 3.

——— ——— VIII, s. 17 (4)—*Lease—Lease from year to year—Act III of* 1877, *s.* 49] In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be executed in his favour by the defendants, and dated respectively in January, 1875, and June, 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum" The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—"And if the said Shaikh wishes to have the land vacated within the said term he shall first give us fifteen days' notice, and we will vacate it with-

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out objection." The lower Courts held that the *sarkhats* were not admissible in evidence as they required registration under s 17 (4) of the Registration Ac (VIII of 1871), being leases of immoveable property from year to year or reserving a yearly rent.

Held, that the two *sarkhats* created no rights except those of tenants-at-will, inasmuch as the clause common to both to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice.

Held, therefore, that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory.

Khuda Bakhsh *v* Sheo Din 405

ACTS—1872—I, s. 33. *See* Criminal Procedure Code, s 512.
——————ss 107, 108—*Missing person. See* Hindu Law 10.
——————s. 114 (*b*)—*Accomplice—Evidence—Corroboration. See* Accomplice.
——————s. 133—*Accomplice—Evidence—Corroboration. See* Accomplice.
——————s. 157. *See* Criminal Procedure Code, s. 512.
——————IX, s. 134. *See* Surety.
——————s. 137. *See* Surety.
——————s 139. *See* Surety.
——————s. 141. *See* Surety.
——————1873—XVIII. *See Str* land 2.
——————XIX, s. 3 (4)—"*Rent*"—*Services. See* Rent-free grant.
——————ss. 79-89. *See* Rent-free grant.
——————s. 91. *See Wajib-ul-arz.*
——————s. 241 (*h*). *See* Rent-free grant.
——————1877—I, s. 21—*Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings.*] One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

Held, that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act.

The contract, the existence of which would bar a suit under the circumstances contemplated by s 21 of the Specific Relief Act must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

Tahal *v.* Bisheshar 57

——————s. 42—*Hindu widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree*] The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was

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invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

Held, that if the widow's possession were only a possession by the plaintiffs' consent entitling her merely to receive the profits for her maintenance, the plaintiffs might eject her from the property, and that before they could obtain a declaration under s 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

Held also, that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

Bholai *v.* Kali 70

ACTS—1877—I, s. 42—*Civil Procedure Code, s.* 578. *See* Hindu Law 9.
——————— *See* Suit for declaration that property is *wakf.*
——————— III, ss. 17, 49—*Effect of a registered instrument confirming a prior one of the same purport not registered.*] An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section *b* of Act III of 1877) being unregistered was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested, —*held* that the fact of the prior deed not having affected the property, being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the object of the Registration Act.

Alexander Mitchell *v.* Mathura Das 6

——————— s. 17 (*d*). *See* Lease 2.
——————— s. 18 (*c*). *See* Lease 2.
——————— s. 49. *See* Act VIII of 1871, s. 17 (4).
——————— s 50—*Mortgage—First and second mortgages—Registered and unregistered documents—Fraudulent transfer—Act IV of* 1882, *s.* 53.] Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank* v. *Barry*, where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforcible. *Rahmatulla* v. *Sanat-ullah* referred to.

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In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

Held that, under these circumstances the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877).

Ram Autar *v.* Dhanauri 540

ACTS—1877—III, s. 50—*Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage-deed.*] The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not" mean that, if a decree has been obtained to bring property to sale under a hypothecation-bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed

Held, that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal* v. *Bansidhar*, *Shahi Ram* v. *Shib Lal*, and *Madar* v. *Subbarayalu* referred to.

The Himalaya Bank, Limited, *v.* The Simla Bank, Limited... 23

———————XV, s. 14—"*Prosecuting*"—'*Good faith*"—"*Other cause of a like nature*"—*Limitation Act, construction of.*] In October, 1881, an account was struck between *K* and *M* and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former Of this amount a sum of Rs. 885 was paid. In March, 1885, *K* sued *M* for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

Held, that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation

Per STRAIGHT, Offg. C. J.—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

Per MAHMOOD, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts, where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as "statutes of repose" and not as of a penal character or

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as imposing burdens. *Roddam v Morley, Syed Ali Saib v Sri Raja Sanyasiraz Peddabaliyra Simhula Bahadur, Empress v Kolu Lalang, Bell v. Morrison, Shah Keramut Hossein v. Gulab Koonwur,* and *Muhammad Bahadoor Khan v. The Collector of Bareilly* referred to.

Mangu Lal *v.* Kandhai Lal 475

ACTS—1877—XV, SCH. ii, No 32—*Landholder and tenant—Suit for removal of trees. See* Jurisdiction 2.

——————————No 62 *See* No 97.

——————————No. 97—*Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Act XV of* 1877, *sch.* ii, *Nos* 62, 120—*Suit for money had and received for plaintiff's use —Suit for money paid upon an existing consideration 'which afterwards fails*] Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1,595, the pre-emptor decree-holder, in August, 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1,595 to the judgment-debtors out of court, and filing a receipt given by them for the money. This application was ultimately struck off. In April, 1881, judgment was given in the appeal, increasing the amount to be paid by the decree holder to Rs 1,994, which was to be deposited in court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree holder assigned to *K* his right to recover from the judgment debtors the sum of Rs 1,595, which he had paid to them in August, 1880. In December, 1883, *K* sued the judgment-debtors for recovery of the Rs. 1,595 with interest

Held, that No 62 of the Limitation Act did not govern the suit, but that No 97, and, if not, No. 120, would apply, and the suit was therefore not barred by limitation.

Koji Ram *v.* Ishar Das 273

——————————No. 118—*Limitation—Suit to obtain a declaration that an alleged adoption is invalid or never took place—Suit for possession of immoveable property—Act XV of* 1877, *sch* ii *No* 141] Art. 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance.

Held, that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877) the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation.

Basdeo *v* Gopal 644

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ACTS—1877—XV, SCH ii, No. 120. *See* No. 97. Pre-emption 1.
———, No. 134. *See* Mortgage 2.
———, No 141. *See* No. 118.
———, No. 144. *See* Adverse possession.
———, No 148. *See* Mortgage 2
———, No. 158. *See* Arbitration 1.
———, No 178—*Amendment of decree—Civil Procedure Code, s.* 206 *See* Civil Procedure Code, s 622.
———. *See* Execution of decree 1, 4.
———, No 179 *See* Execution of decree 1, 4
———, No. 179 (2)—*Execution of decree—Limitation.*]
Art. 179, cl. (2), of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.
A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March, 1882. The last-mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree
Held, that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by limitation
Hur Prashad Roy v. *Enayat Hossein* and *Sangram Singh* v. *Bujharat Singh* distinguished *Mullick Ahmed Zumma* v. *Mahomed Syed* and *Ram Lal* v. *Jagannath* relied on,

Nur-ul-Hasan *v.* Muhammad Hasan 573

———No. 179 (4) *See* Civil Procedure Code, s. 583.
———1879—I, s. 61. *See* Act XLV of 1860, s. 107.
———1881—XII, s. (3) 2—"*Rent*"—*Services. See* Rent-free grant ... 555
——— s. 7—*Meaning of "held" See Sir* land 1, 2.
———*Ex-proprietary tenant—Trees. See* Ex-proprietary tenant 2.
———*See* Ex-proprietary tenant 1, 2. *Sir* land 1, 2.
——— s. 30. *See* Rent-free grant.
——— s. 93 (*b*). *See* Jurisdiction 2.
——— (*g*). *See* Lambardar and co-sharer 2.
——— s 95 (*c*). *See* Rent-free grant.
——— (*l*). *See* Ex-proprietary tenant 1.
——— (*n*). *See* Jurisdiction 1.
———, s 209 *See* Lambardar and co-sharer 1.
———1882—IV—*Mortgage—Foreclosure—Regulation XVII of* 1806, *s.* 8—*Suit for possession of mortgaged property. See* Mortgage 6.
——— s. 2—*Regulation XXXIV of* 1803, *ss.* 9, 10. *See* Mortgage 8.
——— ss. 10, 11. *See* Vendor and purchaser 2.
——— s. 41—*Transfer by ostensible owner. See Sir* land.
——— s 48. *See Sir* land 2.
——— s. 51. *See* Mortgage 9.
——— s. 53. *See* Act III, of 1877, s. 50.
——— s 78. *See* Civil Procedure Code, s. 13.
——— ss. 83, 84. *See* Mortgage 9.
——— s. 85. *See* Civil Procedure Code, s. 13.
——— s 95. *See* Mortgage 2.
——— s. 100. *See* Mortgage 2.
———1882—V, ss 60, 61. *See* License, revocation of.

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ACTS—1883—XV, s. 69—*Act XV of* 1883, *s.* 71—*Municipal rules—Infringement of rules—Prosecutions—N.-W. P Government Notification No.* 865, *dated the 3rd November,* 1869—*Rule VI, legality of.*] Municipal Boards and Magistrates should see that before prosecutions are instituted under the municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government, N.-W. P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner in which, any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

Held, that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

Held, that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

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——— ——— s. 71. *See* s. 69.

ADOPTION—*Jains—Hindu Law.* *See* Jains.

——— ——— OF SISTER'S SON. *See* Hindu Law 1.

ADVERSE POSSESSION—*Mortgage—Suit by mortgagee for possession of mortgaged property—Pre-emption—Purchaser for value without notice—Act XV of* 1877, *sch.* ii, *No.* 144.] Under a registered deed of mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869, the mortgagors sold the property, and, thereupon, one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to *D*. In 1883, the mortgagee brought a suit against *D* to obtain possession under his mortgage.

Held, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a

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decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* distinguished.

Held also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

Held, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.

Durga Prasad *v.* Shambhu Nath 86

AGREEMENT TO REFER TO ARBITRATION. *See* Act I of 1877, s. 21.

ARBITRATION—*Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 508, 509, 511, 523—Application to set aside award—Act XV of 1877, sch. ii, No. 158.*] In an agreement to refer certain matters to arbitration, which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

Held, that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award such as the law contemplated. *Lachman Das* v. *Brijpal* referred to.

Held, that in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

Held that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

Held also, that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure Code, *i. e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

Muhammad Abid *v.* Muhammad Asghar 64

2. ——— ———*Powers of arbitrators—Payments by instalments—Appeal—Civil Procedure Code, ss. 518, 522.*] The arbitrators to whom the matters in difference in two suits for money were referred to arbitration, made an award for payment to the plaintiff of certain sums by

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the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award, in so far as it directed payment by instalments and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed.

Held, that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522 of the Code.

Held also, that as it was clear that the reference to arbitration gave the arbitrators full powers, not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed

Per MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in s 522, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518.

Jawahar Singh *v* Mul Raj 449

ARBITRATION—*Filing award in Court—Partnership—Agreement to refer disputes to arbitration.* *See* Civil Procedure Code, ss. 525, 526.

——————*Making award after the time allowed by Court.* *See* Civil Procedure Code, s. 521.

——————*Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, requisite—Civil Procedure Code, ss. 508, 514, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.* *See* Civil Proceedure Code, s. 521.

——————, AGREEMENT TO REFER TO. *See* Act I of 1877, s. 21.

APPEAL—*Act IX of* 1861, *s.* 5. *See* Muhammadan Law 3.

——————*See* Arbitration 1, 2 Civil Procedure Code, s. 44, Rule (*a*). Civil Procedure Code, ss. 66, 103, 107. Civil Procedure Code, s. 381. Civil Procedure Code, ss. 556, 558. *Exparte* decree 2. Practice. Suit, withdrawal of

——————, SUMMARY REJECTION OF. *See* Criminal Procedure Code, s. 421.

——————TO HER MAJESTY IN COUNCIL—*Question of fact.* *See* Family Custom.

APPELLATE COURT, POWER OF. *See* Criminal Procedure Code, ss. 423, 436, 439. Suit, withdrawal of.

ATTEMPT TO CHEAT—*Act XLV of* 1860, *ss.* 417, 511.] In a prosecution for an attempt to cheat, under ss. 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas*, and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed.

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Held, that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside.

Queen-Empress *v.* Dhundi 304

BOND—*Interest—Penalty.*] The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that, in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender.

In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at Rs 15 per annum, and compound interest for the same period at the same rate.

Held, that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date.

Held that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent., from the due date of payment, upon the entire sum which was due when the bond became due, *i.e.*, the principal added to the compound interest calculated at Rs. 9. per cent.

The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent per annum from the date of the bond. In December, 1884, the obligee brought a suit on the bond against the obligor claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum.

Held that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest from the due date might fairly revert to the old rate of Rs. 9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.

Dip Narain Rai *v.* Dipan Rai 185

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2. BOND—*Mortgage—Words creating simple mortgage—Interest after due date—Measure of damages.*] A suit was brought in 1884, upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest, at Re. 1-8 per cent. per mensem, in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision:—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt" Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

Held, that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the shares and interests of which it recited at the opening that the obligors were owners.

Held, that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, *i. e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke* v. *Fowler* referred to.

Held, that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad* v. *Khuman Singh* referred to.

The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances.

Bishen Dayal *v.* Udit Narain 486

BURDEN OF PROOF—*Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts.* *See* Hindu Law 5.

——— ——— *Limitation—Suit for redemption.* *See* Mortgage 2.

——— ——— *Vendor and purchaser—Non-payment of purchase-money.* *See* Vendor and purchaser 3.

——— ——— *See* Fraudulent transfer. Lambardar and co-sharer 1.

CHARGE—*Lambardar and co-sharer—Payment by lambardar of arrears of revenue due by co-sharer.* *See* Lambardar and co-sharer 2.

——— *—Sessions Court—Addition of charge triable by any Magistrate.* *See* Sessions Court.

CHILDREN, CUSTODY OF. *See* Muhammadan Law 3.

CIVIL AND REVENUE COURTS *See* Jurisdiction 1 2.

CIVIL PROCEDURE CODE, s. 2 -"*Signed*" *See* Act XLV of 1860, s 353.

——— ——— "*Decree.*" *See* Civil Procedure Code, s. 381.

——— ——— ———, s. 13. *Res-judicata.*] Two-thirds of a village were sold by *T*, *P*, and *B*. *B* was the widow of *S*, her name being recorded in respect of the property formerly recorded in his name, and what she sold was his one-third share in the village, the other one third being sold by *T* and *P*. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit *C*, *D*, and *M*, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one and that *B* was not com-

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petent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After *B's* death her daughter *K*, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of *C*, *D* and *M*, against *K*, her mortgagee, and their vendors, to set aside the mortgage and recover the interest which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res-judicata* by reason of the decision in the former litigation.

Held, that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res-judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against *K* in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with *B*, *K's* mother, and on the same side.

Shadal Khan v. *Amin-ullah Khan* referred to by Straight, J., and distinguished by Tyrrell, J. *Narain Kuar* v. *Durjan Kuar* referred to by Straight, J.

Bhagwant Singh v. Tej Kuar 91

CIVIL PROCEDURE CODE, s. 13—*Dismissal of suit under s.* 10, *cl.* ii. *Act VII of* 1870—*Dismissal of suit for misjoinder—Dismissal of suit "in its present form."*] The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*barhaisiyat maujuda*) upon two grounds, first, with reference to s. 10 of the Court-Fees Act (VII of 1870), that the suit was under-valued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit.

Held that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res-judicata*.

Per MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court-Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res-judicata*.

Also *per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been "heard and finally decided" means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res-judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought *Ramnath Roy Chowdhry* v. *Bhagbut Mohaputter*; *Shokhee Bewah* v. *Mehdee Mundul*; *Dullabh Jogi* v. *Narayan Lakhu*; *Rungrav Ravji* v *Sidhi Mahomed Ebrahim*; *Fateh Singh* v. *Lachmi Koer*; *Roghoonath Mundul* v. *Juggut Bundhoo Bose* and *Sankappa Chetti* v. *Rani Kolandapuri Nachiyar*, referred to

Also *per* MAHMOOD J.—The words *ba-haisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no

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intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai* v. *Kalka Prasad* dissented from. *Watson* v. *The Collector of Rajshahye* and *Salig Ram* v. *Tirbhawan* referred to.

Muhammad Salim v. Nabian Bibi 282

CIVIL PROCEDURE CODE, s. 13—*Meaning of "between parties under whom they or any of them claim."—Muhammadan Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of* 1882, *ss.* 78, 85—*Res-judicata*] Upon the death of *G*, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son *A*, one upon each of his five daughters, and one upon his widow *B*. The name of *B* only was recorded in the revenue registers in respect of the zamindari property left by *G*. In 1876, *A* and *B* gave to *X* a deed of simple mortgage of 2½ biswas out of a 5 biswas share of a village included in the said property. In 1878, *A* and *B* gave to *S* a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882, *X* obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by *X* himself in January, 1884. In February and November, 1884, the daughters of *G* obtained *ex-parte* decrees against *A* and *B* in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, *S* brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants *A* and *B*, *G's* daughters, and *X*, alleging that the decrees of February and November, 1884, were fraudulently and collusively obtained; and as to the auction-sale of January, 1884, that the 2½ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by *X* upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that *B's* position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against *A* and *B* in February, 1884, were conclusive, by way of *res-judicata*, against the plaintiff, who, as mortgagee from *A* and *B*, claimed under a title derived from them.

Held, that there being no evidence to show that the decrees of February and November, 1884, were fraudulently and collusively obtained, the Court of first instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter. *Khub Chand* v. *Kalian Das* and *Ali Hasan* v. *Dhirja* referred to.

Per MAHMOOD, J.—According to the Muhammadan Law, the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even

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where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship Even therefore if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act, or the doctrine of equity formulated in s. 41 of the Transfer of Property Act, but here no such circumstances existed.

Also *per* MAHMOOD J.—The decrees of February and November, 1884, did not operate as *res-judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party *claiming under* his mortgagors, within the meaning of s. 13 of the Civil Procedure Code, and that section must be interpreted as if, after the words "under whom they or any of them claim," the word 'by a title arising subsequently to the commencement of the former suit" had been inserted. *Dooma Sahoo* v. *Joonarain Loll* and *Bonomalee Nag* v *Koylash Chunder Dey* referred to. *Outram* v. *Morewood*, *Bonkuntnath Chatterjee* v. *Ameeroonnissa Khatoon*, *Katama Nutchiar* v. *Sivanut Raja Mootoo Vijaya Raganadha* and *Ram Coomar Sein* v *Prosunno Coomar Sein*, distinguished

The principles of the rule of *res-judicata*, as part of the law of civil procedure properly so called, and those of the rule of estoppel, as part of the law of evidence, explained and distinguished.

Sita Ram *v.* Amir Begam 324

CIVIL PROCEDURE CODE, s. 13—*Set-off*. *See* Set-off.

——————, s. 16. *See* Jurisdiction 3.

——————, s. 20. *See* Jurisdiction 3.

——————, s. 44, RULE (*a*)—"*Decree*"—*Order rejecting application under Civil Procedure Code, s 44, Rule (a) and returning plaint—Appeal - Civil Procedure Code s. 2*.] No appeal lies under any of the provisions of s. 588 of the Civil Procedure Code from an order under s. 44, Rule *a*, rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property.

In a plaint filed in the Court of a Subordinate Judge the plaintiff claimed to recover possession of a house, together with some grain which was stored in it The plaintiff applied to the Subordinate Judge for leave under s 44, Rule *a* of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively, in the Court of the Munsif.

Held, that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule *a* of the Code, its effect was to reject the plaint; that such an order was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that

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therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s 622.

Bandhan Singh *v* Solhu 191

CIVIL PROCEDURE CODE, ss. 66, 103, 107—*Dismissal of suit for non-appearance of plaintiff ordered to appear under s 66—Rejection of application to set aside dismissal—Civil Procedure Code, ss* 540, 588 (8).] A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear and under s. 107, read with s. 102, his suit was dismissed, He then applied to the Court under s. 103, for an order to set the dismissal aside, but his application was rejected He thereupon preferred an appeal from the decree dismissing the suit under the provisions of s 540.

Held that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Lal Singh* v. *Kunjan* referred to.

Krishna Ram *v.* Gobind Prasad 20

——— s 103. *See Ex parte* decree 2.
——— , s 108 *See Ex parte* decree 1, 2.
——— , s. 111—*Set-off—Res judicata—Court fee on set-off. See* Set-off
——— , s. 129 *See* Pardah nashin 1.
——— , s. 136 *See* Pardah-nashin 1.
——— , s. 157. *See Ex parte* decree 1.
——— s. 191—*Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor*] A Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed a further adjournment was made The Subordinate Judge, at this stage of the proceedings, was removed and a new Subordinate Judge was appointed

Held, that the trial, so far as it had gone before the first Subordinate Judge, was abortive and, as a trial became a nullity

Held also, that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s 191 of the Civil Procedure Code, to prove their allegations in a different manner. *Jagram Das* v *Narain Lal* referred to.

Afzal-un-nissa Begam *v.* Al Ali 35

——— *Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor.*] The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument At this point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judg-

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ment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below.

Held by the Full Bench that, with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Das* v. *Narain Lal* and *Afzal un-nissa Begam* v. *Al Ali* discussed.

Per STRAIGHT, Offg. C. J., that, as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticized on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

Per OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the work, and the proceedings must be set aside. *Jagram Das* v. *Narain Lal* and *Afzal-un-nissa Begam* v. *Al Ali* followed.

Per MAHMOOD, J., that, although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date; that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trial; that the Judge who succeeds another, after a trial which partly proceeded before his predecessor, is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto* evidence in the cause and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;" that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge; that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s. 564 of the Code to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that where further issues are directed to be tried, or additional evidence is to be taken, the Court of appeal is bound to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial; that even when there has been an irregularity on the part of the first Court in receiv-

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ing or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Jagram Das v. *Narain Lal* and *Afzal-un-nissa Begam* v. *Al Ali* dissented from.

Per TYRRELL, J., that, in reference to the Full Bench, the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagram Das* v. *Narain Lal* and *Afzal-un-nissa Begam* v. *Al Ali* followed and explained.

Jadu Rai *v.* Kanizak Husain 576

CIVIL PROCEDURE CODE, s. 206—*Amendment of decree—Execution of decree—Objection to validity of amendment. See* Decree, amendment of.

——— ——— ——— *Act XV of* 1877, *sch.* ii, *No.* 178. *See* s. 622.

——— ——— ——— *See* Execution of decree, 4.

——— ——— s. 230—*Meaning of "granted"*] Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, *i.e.*, an application for execution should not be granted if a previous application has been allowed under the provisions of that section.

The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248, and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249.

In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March, 1884, the decree-holder applied once more for execution of the decree.

Held that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed.

Paraga Kuar *v.* Bhagwan Din 301

——— ——— ——— *Twelve years' old decree—Execution of decree—Meaning of "granted."*] A decree passed in April, 1872, was kept alive by various applications for execution up to 1883. In February

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and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November, 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old and being made within three years from the passing of the Civil Procedure Code, 1882

Held that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begam* v. *Ghalib Ali*. *Tufail Ahmad* v. *Sadho Saran Singh* dissented from. *Jokhu Ram* v. *Ram Din* referred to.

Per MAHMOOD, J., that the previous execution proceedings, initiated by the applications of February and December, 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. *Paraga Kuar* v. *Bhagwan Din* referred to.

Ramadhar v Ram Dayal 536

CIVIL PROCEDURE CODE, s. 230—*Execution of decree—Twelve years' old decree—Statutes, construction of—General words—Retrospective effect.*] The holder of a decree bearing date the 15th June, 1872, applied for execution thereof on the 9th February, 1885, the previous application being dated the 27th November, 1883.

Held that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraf Begam* v. *Ghalib Ali* followed. *Goluck Chandra Mytee* v *Haraprish Debi*, *Bhawani Das* v. *Daulat Ram* and *Sreenath Gooho* v. *Yusoof Khan* referred to. *Tufail Ahmad* v. *Sadhu Saran Singh* discussed and dissented from by MAHMOOD, J.

Per MAHMOOD, J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.

Jokhu Ram v. Ram Din 419

——————, s. 244—*Question for Court executing decree—Separate suit—Civil Procedure Code, ss.* 266, 316. The provisions of s 244 (*c*) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor, whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII of 1881 (N.-W. P. Rent Act).

Held by the Full Bench that the question involved in the suit was one of the nature referred to in s. 244 (*c*) of the Civil Procedure Code as determinable only by order of the Court executing the decree,

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and that the suit was therefore not maintainable. *Narain* v *Puran* referred to.

Basti Ram *v.* Fattu 146

CIVIL PROCEDURE CODE, s. 244—*Civil Procedure Code, ss.* 278-283—*Question for Court executing decree—Separate suit—"Representative" of judgment-debtor.*] The decree-holder, under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of certain shares, one of which was recorded in the *khewat* in the name of *K* and two others in the name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L* as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objection she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L's* claim, as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to *L's* bringing a suit to establish his right. On the other side it was contended that *L*, being the representative of the deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie.

Held that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L's* claim, which was rejected by it, was nothing more than to come in as *B's* representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution-proceeding, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution-proceedings.

Wahed Ali v. *Jumaee, Ram Ghulam* v. *Hazaru Kuar, Sita Ram* v. *Bhagwan Das, Shankar Dial* v. *Amir Haidar, Nath Mal Das* v. *Tajammul Husain* and *Kanai Lal Khan* v. *Sashi Bhuson Biswas* referred to.

Bahori Lal *v.* Gauri Sahai 626

——— ——— ——— ——— s. 251. *See* Act XLV of 1860, s. 353.

——— ——— ——— ——— s. 253—*Execution of decree against surety. See* Execution of decree 5.

——— ——— ——— ——— s. 266. *See* s. 244.

——— ——— ——— ——— ss. 278-283. *See* s. 244.

——— ——— ——— ——— s. 295—*Execution of decree—Attachment of property—Payment into Court of money due under decree—Assets realized by sale or otherwise.*] *G* and *C* held decrees against *B* and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of *G's* decree.

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Held that *G* was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.

Gopal Dai *v.* Chunni Lal ... ...

———, ss. 311, 312. *See* Execution of decree 2.
———, s. 316. *See* s. 244.
———, s. 373. *See* Suit, withdrawal of.
———, s. 381—*Civil Procedure Code. s.* [2—*Appeal.*] The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree."

Held by the Full Bench that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code.

J. R. Williams *v.* T. A. Brown 108

———, s. 508. *See* s. 521. Arbitration 1.
———, s. 509. *See* Arbitration 1.
———, s. 511. *See* Arbitration 1.
———, s. 514. *See* s. 521.
———, s. 518—*Civil Procedure Code, s.* 522—*Appeal. See* Arbitration 1.
———s. 521—*Arbitration—Making award after the time allowed by Court.* Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

Held that the award was not "made within the period fixed by the Court" within the meaning of s. 521 of the Civil Procedure Code.

Behari Das *v.* Kalian Das 543

———*Arbitration—Making award after the time allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Civil Procedure Code, ss.* 508, 514, 522 *—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.*] The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.

An award which is invalid under s. 521 of the Civil Procedure Code, because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies with reference to the ruling of the Full Bench in *Lachman Das* v. *Brijpal.*

Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant

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in the first Court, *held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.

Chuha Mal *v.* Hari Ram 518

CIVIL PROCEDURE CODE, s 522—*Appeal. See* Arbitration 2.

——————————*Decree in accordance with award—Appeal. See* s 521.

——————————, s. 523 *See* Arbitration 1.

——————————, ss. 525, 526—*Filing award in Court—Partnership—Agreement to refer disputes to arbitration*] The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire Certain differences having arisen among the three partners, two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed, but they refused to do so The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s. 520 or s 521 of the Code

Held that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators, that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *primâ facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox* v. *Storkey* and *Re Newton and Hetherington* referred to.

Held also that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of the award, must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* and *Ichamoyee Chowdhranee* v *Gosunno Nath Chowdhry* dissented from. *Dutto Singh* v. *Dosad Bahadur Singh*, *Dandekar* v. *Dandekar* and *Chowdhry Murtaza Hossein* v. *Bech-un-nissa*, referred to.

Jones *v.* Ledgard 340

——————————, s. 539. *See* Suit for declaration that property is *wakf*.

——————————s. 540. *See Ex-parte* decree 2.

——————————, ss. 540, 588 (8) *See* Civil Procedure Code, ss. 66, 103, 107.

——————————ss. 545, 546—*Execution of decree against surety. See* Execution of decree 5.

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CIVIL PROCEDURE CODE, s. 549.] An appeal, although it may have been rejected by the appellate Court under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.

The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.

Balwant Singh *v.* Daulat Singh 315

——————————*See* Practice.

——————————ss. 556, 558—*Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.*] In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

Held that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.

Zainab Begam *v.* Manawar Husain Khan 277

——————————s. 560. *See Ex-parte* decree.

——————————s. 561—*Objections by respondent—Withdrawal of appeal.*] Where an appeal was dismissed upon the application of the appellant himself made before the hearing—*held* that the respondents, who had filed objections to the decree of the Court of first instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Coomar Puresh Narain Roy* v. *Watson and Co.* and *Dhondi Jagannath* v. *The Collector of Salt Revenue* referred to.

Maktab Beg *v.* Hasan Ali 551

——————————, s. 562. *See* Res-judicata.

——————————, ss. 565, 566. *See* Res-judicata.

——————————, s. 578—*Act I of* 1877, *s.* 42. *See* Hindu Law 9.

——————————, s 582. *See* Suit, withdrawal of.

——————————s 583—*Execution of decree—Decree enforcing the right of pre-emption—Non-payment of purchase-money decreed by appellate Court—Restitution of purchase-money paid under lower Court's decree—Application for restitution—Revival of application.*] A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July, 1880, the plaintiff paid this amount into Court, and it was drawn out by the defendant in August, 1881. Meanwhile, in July, 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May, 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted, and the defendant ordered to refund, and this order was confirmed on appeal in January 1885, and by the High Court in second appeal in May, 1885. Meanwhile the first Court had suspended execution of the order pending

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the result of the appeal, and in December, 1884 removed the application temporarily from the "pending" list In February, 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant This application was dismissed as barred by limitation

Held that this application was only a revival of the application of May, 1883, which was within time

Held also that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July, 1881, that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower appellate Court, that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decree in suits,' that he did this in May, 1883, by an application made according to law in the proper Court in the sense of art 179 of the Limitation Act, and that his present application to the same effect being within three years from that application was within time.

Nand Ram *v* Sita Ram 515

———, s. 584 *See Ex parte* decree 2.

———, s. 588 (28) *See* Res-judicata

———, s 610—*Privy Council decree—Execution for costs—Rate of exchange—Meaning of 'for the time being'*] Under the last paragraph of s 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed.

The decree-holders, under a decree passed by Her Majesty in Council, having taken out execution for a sum of £119 11 under s 610 of the Civil Procedure Code—*held* that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to.

Param Sukh *v* Ram Dayal 650

———, s. 622 *High Court's powers of revision—"Jurisdiction"—"Illegality—"Material irregularity"*] A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs 1,000 in value, held that he had no jurisdiction to entertain the suit and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code

Held, by the Full Bench that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code

The result of *Amir Hassan* v *Sheo Baksh Singh* and *Magni Ram* v *Jiwa Lal* is that the questions to which s 622 of the Civil Procedure Code applies are questions of jurisdiction only The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under

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s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final.

Per STRAIGHT and TYRRELL, JJ.—Clauses (*a*) and (*b*) of s. 584, specifying the grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (*c*) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, *i. e.*, some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Maulvi Muhammad* v. *Syed Husain* referred to.

Badami Kuar *v.* Dinu Rai 111

——— *High Court's powers of revision—Meaning of "jurisdiction"—Amendment of decree—Civil Procedure Code, s.* 206 *—Act XV. of* 1877, *sch.* ii, *No.* 178]. In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May, 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitatoin and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it.

Held that the application for revision must be rejected.

Per OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* and of the Full Bench in *Badami Kuar* v. *Dinu Rai*, and further that upon the facts stated, the Court ought not to interfere

Per MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Bakhsh Singh*, *Badami Kuar* v. *Dinu Rai*, *Raghunath Das* v. *Raj Kumar*, *Surta* v. *Ganga*, *Magni Ram* v. *Jiwa Lal*, *Har Prasad* v *Jafar Ali* referred to. *Bhagwant Singh* v. *Jageshar Singh* and *Abu Said Khan* v. *Hamid-un-nissa* dissented from.

The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the power of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy, either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe* v. *Edwards* and *Crepps* v. *Durden* referred to.

Held also *per* MAHMOOD, J., that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code; that it did so entertain it; and that in making the amendment

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its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622. *Lucas* v *Stephen*, *Oomanund Roy* v. *Maharajah Suttish Chunder Roy*, *Zahoor Hossein* v. *Syedun*, and *Goluck Chunder Mussant* v. *Ganga Narain Mussant* referred to.

Under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV. of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Roberts* v. *Harrison*, *Vithal Janardan* v. *Rakmi*, and *Kylasa Goundan* v. *Ramasami Ayyar* referred to.

Dhan Singh *v.* Basant Singh 519

COMMITMENT. *See* Criminal Procedure Code, ss. 423, 436, 439.
CONSIDERATION. *See* Fraudulent Transfer.
———, FAILURE OF. *See* Vendor and purchaser 1.
COSTS, SUIT TO RECOVER, BY WAY OF DAMAGES. *See* Vendor and purchaser 2.
———, SECURITY FOR. *See* Practice.
———. *See* Execution of decree 3.
CRIMINAL BREACH OF TRUST.—*Master and servant—Servant entrusted with moneys for payment to tradesman of account settled with master for a specific sum—Gratuity of tradesman to servant—Right of master to benefit of gratuity—Act XLV of* 1860, *ss.* 405, 409.] When a master entrusts his servant with money for the payment of an *open* account, *i.e.*, an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has *settled* the account with the tradesman for a specific sum and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money. *Hay's Case* [In re *Canadian Oil Works Corporation*] referred to.

Queen-Empress *v.* Imdad Khan 120

CRIMINAL PROCEDURE CODE, s. 28. *See* Sessions Court.
——— s. 134. *See* Act XLV of 1860, s 291.
———, s. 143. *See* Act XLV of 1860, s. 291.
———, s. 144. *See* Act XLV of 1860, s 291.
———, s. 195. *See* Act XLV of 1860, s. 211. Act XLV of 1860, s. 182.
——— s. 216—*Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s.* 216—*Witness summoned by Sessions Court—Criminal Procedure Code, ss.* 291, 540.] Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for

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believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoner, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it.

Held that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

Per STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

In the matter of the petition of the Rajah of Kantit ... 668

———————, s. 226. *See* Sessions Court.

———————, ss. 236, 237—*Sessions Court—Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it.* *See* Sessions Court.

——————— s. 291. *See* s. 216.

———————, s. 367. *See* s. 421.

———————, s. 421—*Appeal, summary rejection of—Judgment of criminal appellate Court—Criminal Procedure Code, ss.* 367, 424, 439—*High Court's powers of revision—Delay in applying for exercise.*] The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code by an order consisting merely of the words "appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing—*held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere.

Queen-Empress *v.* Ram Narain 514

——————— s. 423—*Powers of appellate Court to alter finding of Court of first instance.*] Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal

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Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding, under s 423 of the Criminal Procedure Code to a conviction for some other offence for which the accused had not been charged or tried.

Queen-Empress *v* Imdad Khan 120

CRIMINAL PROCEDURE CODE, ss. 423, 436 439—*Appellate Court, powers of—Commitment*] The appellate Court referred to in s 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

The meaning of the words in s 423 (*b*) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial," is as follows :—If in an appeal from a conviction the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session has been tried, convicted, and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence and to order that the accused be committed for trial.

Queen Empress *v.* Sukha 14

——— ———, s. 424 *See* s. 421

——— ——— s 439—*High Court's powers of revision—Delay in applying for exercise* *See* s 421

——— ——— s 494 *See* Prosecution, withdrawal from

——— ——— s 512—*Act I of* 1872, *ss* 33, 157—*Witness, retening—Duty of Magistrate*] In 1874 five out of six persons who were named as having committed a murder were arrested, and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate the sixth accused person absconded, as was recorded by the Magistrate In their examination before that officer the witnesses deposed to the absconder having been one of the participa o s in the crime charged against the prisoners then under trial In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder At that time most of the former witnesses were dead, and the Sessions Judge, referring to s 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court He also admitted the deposition of a surviving witness, which had been given in 1874 before the Sessions Court This witnefs now also gave evidence against the prisoner.

Held that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

Held, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code

Per STRAIGHT, J, that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

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In cross-examination before the Court of Session a witness stated that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody."

Held that if the Magistrate did so address the witness, he exceeded his duty.

Queen-Empress *v.* Ishri Singh 672

CRIMINAL PROCEDURE CODE, s. 537 *See* Sessions Court.

——— ——— ——— ——— ——— ——— s. 540. *See* s 216.

——— ——— ——— ——— ——— ——— , sch V, Form XX. *See* Act XLV of 1860, s. 291.

CULPABLE HOMICIDE NOT AMOUNTING TO MURDER—*Grave and sudden provocation* *See* Murder 1, 2.

DAUGHTER'S SON. *See* Hindu Law 9, 10.

DECLARATORY DECREE—*Reversioner—Act I of* 1877, *s.* 42. *See* Hindu Law 9.

——— ——— ——— ——— ——— *Hindu Law—Reversioner.* *See* Hindu Law 11.

——— ——— ——— ——— ——— *See* Act I of 1877, s. 42.

DECREE." *See* Civil Procedure Code, s. 44, Rule (*a.*) Civil Procedure Code, s 381. Suit, withdrawal of.

———, AMENDMENT OF—*Execution of decree—Objection to validity of amendment—Civil Procedure Code, s.* 206.] The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282 Subsequently, on application by the decree-holder and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the decree disallowed the objection, on the ground that it was not such as could be entertained in the execution-department.

Held that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party as required by s 206 of the Code.

Held also that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed.

Abdul Hayai Khan *v.* Chunia Kuar 377

——— ——— ——— ——— ——— *Act XV of* 1877, *sch.* ii, *No.* 178. *See* Civil Procedure Code, s. 622.

——— ——— ——— ——— ——— . *See* Execution of decree 4.

DOCUMENTS, DISCOVERY OF. *See* Pardah-nashin 1.

DOWER. *See* Fraudulent transfer. Muhammadan law 1.

EXECUTION OF DECREE—*Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of* 1877, *sch.* ii, *Nos.* 178, 179.] A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February, 1885, the decree-holder applied for execution of the decree.

Held that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the

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Limitation Act, and not of art. 179, should be applied to the case; and the application for execution having been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation.

Thakur Das *v.* Shadi Lal 56

2 EXECUTION OF DECREE—*Sale of immoveable property—Error in proclamation of sale as to incumbrance to which property was liable—Civil Procedure Code, ss* 311, 312] In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree holder held two charges on the property, aggregating about Rs. 1,000. There was, in fact, one charge only, amounting to about Rs. 800.

Held that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.

Kanji Mal *v.* Bibi Sailo 116

3. ——— ——— *Costs—Reversal of decree—Refund of costs recovered by execution—Interest.*] A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

Held that the appellant was entitled to the interest claimed on the refund of costs. *Forester* v. *The Secretary of State for India in Council* referred to.

Ram Sahai *v.* The Bank of Bengal 262

4. ——— ——— ——— *Adjudication that execution is barred by limitation—Finality of order—Civil Procedure Code, s.* 206—*Amendment of decree—Act XV of* 1877, *sch* ii, *Nos.* 178, 179] An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time. This order was upheld on appeal in March, 1885. While the appeal was pending the decree-holder in May, 1884 applied to the Court of first instance to amend the decree under s 206 of the Civil Procedure Code, and in December, 1884 the application was granted In April, 1885 an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case.

Held that No. 179 and not No 178 was applicable; that the order rejecting the application of the 19th February, 1884 became final on being upheld on appeal; that the amendment could not revive the decree or furnish a fresh starting-point of limitation; and that the application was therefore time-barred. *Mungul Pershad* v. *Grija Kant Lahiri* and *Ram Kirpal* v. *Rup Kuari* referred to.

Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code.

Tarsi Ram *v.* Man Singh 492

——— ——— ——— *Amendment of decree—Objection to validity of amendment.* *See* Decree, amendment of.

5. ——— ——— ——— *Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss.* 253, 545, 546.] S. 253 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the

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Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution-department to recover the amount from the surety.

Held that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

Hardeo Das *v* Zaman Khan 639

EXECUTION OF DECREE—*Civil Procedure Code, s.* 230—*Meaning of "granted"* *See* Civil Procedure Code, s. 230.

——————— *Twelve years' old decree.* *See* Civil Procedure Code, s. 230.

——————— *Limitation.* *See* Act XV of 1877, sch ii, No. 179 (2).

——————— *Revival of application—Act XV of* 1877, *sch.* ii, No. 179 (4). *See* Civil Procedure Code, s. 583.

——————— *See* Civil Procedure Code, s. 230. Civil Procedure Code, s. 295.

EX PARTE DECREE—*Suit, adjournment of hearing of—"Appearance" of defendant—Civil Procedure Code, ss.* 108, 157.] A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in Court a pleader who had been instructed by the two principal defendants at the outset and who had filed his *vakalatnama.* There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defence, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances, the plaintiffs gave their evidence and the Munsif decreed the claim.

Held that under the circumstances stated, the defendants' pleader must be taken not to have been in Court on the date fixed for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable, and the decree was an *ex parte* decision which it was open to the Munsif to reconsider.

Hira Dai v. *Hira Lal* followed.

Ramtahal Ram *v.* Rameshar Ram 140

2. ——————— *Appeal—Civil Procedure Code, ss.* 103, 108, 540, 560, 584—*Construction of statute—General words*] *Held* by the Full Bench (STRAIGHT, Offg. C.J. and TYRRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s 560 to the Court which passed the decree to re hear the appeal. *Ramjas* v. *Baijnath* approved.

Per OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of

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the Code. *Lal Singh* v. *Kunjan* and *Ramshet Bachaset* v. *Balkishna Ababhat* referred to.

Per MAHMOOD, J.—The distinction is one of detail merely and not of principle *Lal Singh* v *Kunjan* dissented from. *Zain-ul-abdin Khan* v *Ahmad Raza Khan*, *Jamait-un-nissa* v. *Lutf-un-nissa*, *Ashruff-un-nissa* v *Lehureaux*, *Luckmidas Vithaldas* v *Ebrahim Oosman*, *Anantharama* v. *Madhava Panikar* and *Modalatha's Case* referred to.

Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other.

Ajudhia Prasad *v.* Balmukand 354

EX-PROPRIETARY TENANT—*Act XII of* 1881, *ss.* 7, 95 (*l*)—*Determination of rent by Revenue Court - Suit for arrears of rent as so determined for period prior to such determination.*] An application was made in the Revenue Court under s. 95 (*l*) of the N.-W. P. Rent Act (XII of 1881) by the purchaser of proprietary rights in a mahál, for determination of the rent payable by his vendors, who had become, under s. 7, his ex-proprietary tenants in respect of the land they had previously held as *sir*. The Revenue Court, by an order dated the 18th February, 1884, fixed the rent at a particular sum payable annually, after making the deduction of four annas in the rupee required by s 7 of the Rent Act. In May, 1884, the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed for a period of three years prior to the Revenue Court's order.

Held, by the Full Bench, that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February, 1884, subject to any question of limitation that might arise.

Mahadeo Prasad *v.* Mathura 189

2. ——— ——— ———*—Nature of the right of occupancy—Act XII of* 1881, *s.* 7—*Trees*] In a suit for recovery of possession of zamindari property conveyed by a sale-deed, including certain plots of land which were the defendant-vendor's *sir*, the lower Courts held, with reference to s 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees, on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

Held that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

Per MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad cœlum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Bibee Sohodwa* v. *Smith*, *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen*, *Gopal Pandey* v. *Parsotam Das*, *Goluck Ram* v. *Nuba Soondaree Dassee*, *Shaikh Mahomed Ali* v. *Bolakee Bhugut*, *Ram Baran Ram* v. *Salig Ram Singh*, and *Debi Prasad* v. *Har Dyal* referred to.

Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights ; for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees,

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because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

Deoki Nandan *v.* Dhian Singh. 467

EX-PROPRIETARY TENANCY. *See* Sir-land.

FAMILY CUSTOM—*Wajib-ul arz—Muhammadan Law—Appeal to Her Majesty in Council—Question of fact.*] It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of first instance, found that this custom had not been proved to prevail in the family.

On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate, who held all the shares in the village, having caused an entry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained.

Held, that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhammadan law of descent.

The appeal was not taken out of the rule as to the concurrent findings of two Courts, primary and appellate, on a question of fact.

Muhammad Ismail Khan *v.* Fidayat-un-nissa 516

FORECLOSURE. *See* Mortgage 6.

FORGERY—"*Dishonestly*"—*Fraudulently.*" *See* Act XLV of 1860, ss. 24, 25.

FRAUDULENT TRANSFER *Burden of proof—Muhammadan Law—Sale of immoveable property by Muhammadan in satisfaction of wife's dower—Consideration—Deferred debt*] A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference *Wood v Dixie*, *Chowne v. Baylis*, and the authorities collected in the notes to *Twyne's Case* referred to.

Pending a suit for recovery of a debt, the defendant, who was a Muhammadan, executed a deed of sale, dated in June, 1882, of a four annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right and to set aside the attachment order

Held, that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was

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executed—the four annas still remaining the property of the vendor, and as such liable to the attachment.

Held, applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June, 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it and to succeed in the suit

Suba Bibi *v.* Balgobind Das 178

FRAUDULENT TRANSFER. *See* Act III of 1877, s. 50.
GOVERNMENT PLEADER *See* Prosecution, withdrawal from.
GUARDIAN—*Muhammadan Law—Mother.* *See* Civil Procedure Code, s. 13.
HEREDITARY TITLE—*Istimrari patta.* *See* Lease 1.
HIGH COURT'S POWERS OF REVISION—*Criminal Procedure Code, s* 439. *See* Criminal Procedure Code, s 421.
——————————————— *See* Civil Procedure Code, s. 622
HINDU LAW—*Brahmans—Adoption of sister's son—Suit for partition of property by person in possession making a false claim thereto.*] According to the Hindu law, a Brahman cannot validly adopt his sister's son.

B, a childless Hindu and a Brahman, adopted *X*, his sister's son, and subsequently, apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate.

Held, that the adoption of *X* by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs.

Held, also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory* v. *Delamirie* and *Asher* v. *Whitlock* referred to.

Parbati *v* Sundar 1

——————*Adoption—Jains.* *See* Jains.
2. ——————*Joint family—Power of the father to alienate ancestral property for pious purposes*] According to the Hindu law, the power of the father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande* v *Babu Kunwar Singh* referred to

In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended that the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower appellate Court for the purpose of ascertaining whether the endowment had been made *bonâ fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff.

Raghunath Prasad *v.* Gobind Prasad 76

3. ——————*Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.*] When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold,

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the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i. e.*, the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder

Girdharee Lall v *Kantoo Lall*, *Deendyal Lall* v. *Jugdeep Narain Singh*, *Suraj Bunsi Koer* v. *Sheo Persad Singh*, *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh* *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*, *Hurdey Narain Sahu* v. *Rooder Perkash Misser*, *Nonomi Babuasin* v. *Modun Mohun*, *Ram Narain Lal* v. *Bhawani Prasad*, *Gaura* v. *Nanak Chand Appovier* v. *Rama Subba Aiyan*, *Phul Chand* v. *Man Singh*, *Chamaili Kuar* v. *Ram Prasad*, and *Rama Nand Singh* v. *Gobind Singh* referred to.

Basa Mal *v.* Maharaj Singh 205

4. HINDU LAW—*Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt when not incurred for immoral purposes.*] A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit *G* died and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas, and not merely against the share therein which *G*, during his lifetime, might have got separated, the plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G's* personal expenses.

Held, that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomi Babuasin* v. *Modun Mohun* followed.

Sita Ram *v.* Zalim Singh 231

5. ——— *Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof*] The rule enunciated by the Privy Council in *Muddun Thakoor* v. *Kantoo Lall* and *Suraj Bunsi Koer* v. *Sheo Persad Singh*, "that where joint ancestral property has passed out of a joint family, either under

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a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee,' is limited to antecedent debts, *i e*, to debts contracted before the sale or mortgage sought to be impeached by the son, and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

Lal Singh *v.* Deo Narain Singh 279

6. HINDU LAW—*Joint and undivided Hindu family—Joint and undivided property—Debts of deceased member—Liability of his interest.*] *J*, a member of a joint Hindu family, left two sons, *R* and *S* *S* borrowed money upon a simple bond and, after his death, the obligee sued his widow and daughter in-law upon the bond, obtained a decree against them, and in execution thereof brought to sale *S's* interest in the property *B*, the grandson of *R*, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of *S* and himself, and could not be attached and sold in satisfaction of *S's* debt

Held, that on the death of *S*, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of *S* when he had not obtained judgment against *S* and taken out execution by attachment against him. *Suraj Bunsi Koer* v *Sheo Persad Singh* and *Rai Bal Kishen* v. *Rai Sita Ram* referred to.

Balbhadar *v.* Bisheshar 495

7. ——————*Inheritance—Sudras—Illegitimate son*] *Held* that an *Ahir*, who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra *Vencatachella Chetty* v *Parvathammal*, *Parisi Nayudu* v *Bangaru Nayudu* *Viraramuthi Udayan* v *Singaravelu*, *Rahi* v. *Govinda*, and *Narayan Bharthi* v. *Laving Bharthi* referred to.

Dalip *v* Ganpat 387

8. ——————*Stridhan—Succession*] Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records A suit was instituted against *S* and his son by *C*, on the allegation that he and *J*, who were collateral relatives of the widow's husband, were entitled, under the Hindi Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property In defence the adoption was pleaded, and another plea was that the widow had left a brother who, in the absence of the adoption, would succeed to the property, to the exclusion of the plaintiff. The

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Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

Held that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu law. *Thakoor Deyhee* v. *Baluk Ram* followed. *Munia* v. *Puran* distinguished.

Champat *v.* Shiba 393

9. HINDU LAW—*Daughter's son—Hindu widow—Decree against widow—Reversioner—Res-judicata—Declaratory decree—Act I of* 1877, *s* 42—*Civil Procedure Code, s.* 578] A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers, *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognised the plaintiffs' rights and conceded that the family was joint. After *K's* death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M's* son, who had been born after *K's* compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and upon these findings, gave him a decree declaring his right to possession on *M's* death. The lower appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

Per MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Amirtolal Bose* v. *Rajoneekant Mitter*, *Sibta* v. *Badri Prasad*, and *Baijnath* v. *Mahabir* referred to.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res-judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bonâ fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anund Koer* v. *The Court of Wards*, *Nand Kumar* v. *Radha Kuari* and *Katama Natchiar's Case* referred to.

Also that *M's* withdrawal of her suit was not a bar to the suit of the plaintiff.

Also that it could not be said that a daughter's son was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of

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equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint and the prayer of the plaintiff, that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised, and that such improper exercise of discretion under s 42 of the Specific Relief Act has no higher footing than that of an error, defect, or irregularity not affecting the merits of the case or the jurisdiction of the Court within the meaning of s 578 of the Civil Procedure Code

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere

Ram Kanaye Chuckerbutty v *Prosunno Coomar Sein, Sadut Ali Khan* v. *Khajeh Abdool Gunnie Sheo Singh Rai* v *Dakho*, and *Damoodar Surmah* v. *Mohee Kant Surmah* referred to.

Sant Kumar v Deo Sarán 365

10. HINDU LAW—*Daughter's son—Missing person—Act I of* 1872 *ss* 107, 108] Ss 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter that the daughter s son s right of inheritance initiates, and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property and so continued till her death in 1882 At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870 In 1884 a purchaser from *S* claimed possession of the whole estate and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

Held that the question whether the defendant's father was living at the time of the second widow's death in 1882, was a question of evidence governed by ss. 107 and 108 of the Evidence Act, that under the circumstances the defendant's father must be held to have died prior to the time referred to, that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff s vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed

Mazhar Ali v *Budh Singh Janmajay Mazumdar* v *Keshab Lal Ghose, Guru Das Nag* v *Matilal Nag* and *Parmeshar Rai* v. *Bisheshar Singh* referred to.

Dharup Nath v Gobind Sarán 614

11 ——— ——— *Sadhs—Partition between widow and mother, both claiming life interest—Alienation by mother—Reversioner—Declaratory decree.*] Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to

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arbitration and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life interest only in the property. The parties were Sadhs.

Held that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law.

Held that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision come to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners.

Held also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death.

Gopi Chand *v.* Sujan Kuar 646

HINDU LAW. *See* Restitution of conjugal rights.

HINDU WIDOW—*Decree against widow—Fraud—Reversioner.*] Upon the death of *R*, a Hindu, who was separate from his brother *S*, his widow *G* became life-tenant of his estate and his daughter *B* became entitled to succeed after *G*'s death. In 1882, a suit was brought by *S* and *G* against *V* to recover the value of a branch of a mango tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that *R* was not the owner of the grove, nor was *G* the owner. In 1885, *B* brought a suit against *G*, *S*, *V*, and *A*, to whom *V* had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in collusion between *S* and *G* on the one hand and *V* on the other, for the purpose of improperly preventing her from asserting her rights.

Held that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though *S* might have been improperly joined as plaintiff, any decision then passed against *G* would be binding upon the present plaintiff and estop her again litigating questions which were then decided.

Held also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the plaintiff under the circumstances.

Held also that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon this form of plaint.

Katama Natchiar's Case, Adi Deo Narain Singh v. *Dukharan Singh*, and *Sant Kumar* v. *Deo Saran* referred to.

Sachit *v.* Budhua Kuar 429

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2. HINDU WIDOW—*Re-marriage—Presumption of legality of marriage—Act XV of* 1856.] Sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court, on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins; that according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate.

Held that the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and, looking to the provisions of Act XV of 1856 the presumption was in favour of the legality of such marriage until the contrary was shown, *i e*, until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited.

Lachman Kuar *v.* Murdan Singh 143

——————*Decree against widow—Reversioner—Res judicata. See* Hindu Law 9.

——————*See* Act I of 1877, s. 42

HUSBAND AND WIFE. *See* Muhammadan Law 1. Restitution of conjugal rights.

INTEREST—*Bond—Interest after due date—Measure of damages. See* Bond 2.

————*Mortgage—Redemption—Act IV of* 1882, *ss* 83, 84. *See* Mortgage 9.

——————*See* Bond 1 Execution of decree 3. Mortgage, 5, 9.

"ISTIMRARI PATTA"—*Hereditary title. See* Lease 1.

JAINS—*Adoption—Hindu Law—Second adoption by widow*] In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and that as such adopted son he was entitled to all the property left by her deceased husband, it was found that, subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff and without leaving widow or child.

Held that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband

Held, therefore, that the adoption of the plaintiff was valid and effective.

Held that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother the first adopted son so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai* v. *Dakho* referred to.

Lakhmi Chand *v* Gatto Bai 319

JOINT HINDU FAMILY—*Partnership—Suit by one member for debt due to family firm*] In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending

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business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "malika."

Held that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

Jugal Kishore *v.* Hulasi Ram 264

JOINT HINDU FAMILY. *See* Hindu Law 2, 3, 4, 5, 6.

JUDGMENT OF CRIMINAL APPELLATE COURT. *See* Criminal Procedure Code, s 421

JURISDICTION—*Civil and Revenue Courts—Suit by lessee of occupancy tenant for recovery of possession—Act XII of* 1881, *s.* 95 (*n*)] S 95 (*n*) of the N.-W. P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease from which the lessor has ejected him and such a suit is exclusively cognizable by the Revenue Courts. *Muhammad Zaki* v. *Hasrat Khan* and *Ribban* v. *Partab Singh* distinguished.

Chhiddu *v.* Narpat 62

2. ——— *Landholder and tenant—Suit for the removal of trees—Act XV of* 1877, *sch* ii, No. 32—*Civil and Revenue Courts—Act XII of* 1881, *s* 93 (*b*)] *Held* that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court *Deodat Tiwari* v. *Gopi Misr* referred to.

Held also that No. 32, sch. ii of the Limitation Act (XV of 1877) applied to the suit. *Raj Bahadur* v *Birmha Singh*, *Amrit Lal* v. *Balbir*, and *Kedarnath Nag* v. *Khetturpaul Srittirutno* referred to.

Gangadhar *v.* Zahurriya 446

——— *Civil and Revenue Courts.* *See* Rent-free grant.

3. ——— *Place of suing—Suit for sale of mortgaged property—Civil Procedure Code, ss.* 16, 20.] In 1879 *R* gave *J* a bond containing a simple mortgage of immoveable property. Subsequently *R* and *P* jointly gave *D* a bond containing a simple mortgage of the same property. In 1881 *D* obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 *J* obtained a decree in the Court of the Munsif of *G* (within the local limits of whose jurisdiction the property was not situated), for enforcement of his mortgage-bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of *J's* decree, so far as it ordered the sale.

Held that *J's* decree could only be regarded as a simple money-decree because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction, and neither the proviso to s. 16 nor s. 20 of the Code met the circumstances.

Held, therefore, that the plaintiffs were entitled in this suit to have it declared that *J's* decree was a simple money decree only, on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiff's possession from any part of it.

Gudri Lal *v.* Jagannath Ram 117

——— *Statute, construction of.* *See* Mortgage 3.

——— *Suit for redemption of mortgage.* *See* Mortgage 3.

LAMBARDAR AND CO-SHARER—*Suit by co sharer for profits—Burden of proof—Act XII of* 1881, *s.* 209.] When a co-sharer

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claims a dividend on the full rental of the mahál, and the lambardár pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár in the sense of s 209 of the N.-W. P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections

Dhanak Singh *v.* Chain Sukh 61

2. LAMBARDÁR AND CO-SHARER—*Government revenue—Payment by lambardár of revenue due by co-sharer—Charge—Act XII of* 1881, *s* 93 (*g*).] In execution of a decree obtained by a lambardár under s 93 (*g*) of the N.-W. P. Rent Act, the decree holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it and could bring it to sale to satisfy the decree.

Held that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nagender Chunder Ghose* v. *Sreemutty Kaminee Dossee* referred to.

Lachman Singh *v.* Salig Ram 384

——————————*Collection of rents by co sharer—Suit by lambardár for money had and received. See* Vendor and purchaser 2.

LANDHOLDER AND TENANT—*Suit for removal of trees—Act XV of* 1877 *sch. ii, No.* 32—*Jurisdiction—Civil and Revenue Courts—Act XII of* 1881, *s* 93 (*b*). *See* Jurisdiction 2.

LEASE—*Istimrari patta—Hereditary title—Construction of patta.*] In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows:—"So long as the rent is paid I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.-W. P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

Held that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make the instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh* v. *Ramnarain Singh* followed. *Lakho Kowar* v. *Harikrishna Singh* dissented from.

Gaya Jati *v.* Ramjiawan Ram 569

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2. LEASE—*Lease for one year—Lease exceeding one year—Act III of* 1877, *ss.* 17 (*d*), 18 (*c*).] A kabuliyat dated the 6th May, 1880, and executed by the lessee of a house in favour of the lessors, set forth that the house was let to the former at an annual rent of Rs. 3 for a term of one year. It also contained this stipulation :—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8, arrears of rent, the defendant pleaded that, according to the right construction of the lease he was entitled to occupy the house and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880 to the 6th May, 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

Held that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the expiry of the year 1880-81, and that the plaintiffs were therefore entitled to possession of the house. *Hand* v. *Hall* referred to.

Khayali *v.* Husain Bakhsh 198

———*Lease from year to year—Act VIII of* 1871, *s.* 17 (4). *See* Act VIII of 1871, s 17 (4).

LICENSE, REVOCATION OF—*Works of permanent character executed by licensee—Act V of* 1882, *ss.* 60, 61.] In a suit by a zamindar to have his right declared to build a house on some waste land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung.

Held that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.

The Land Mortgage Bank of India *v.* Moti 69

LIMITATION—*Act XV of* 1877, *sch.* ii, *Nos.* 118, 141. *See* Act XV of 1877, sch ii, No. 118

———*Suit for redemption—Burden of proof.* *See* Mortgage 2.

———*See* Vendor and purchaser 1.

LIMITATION ACT, CONSTRUCTION OF. *See* Act XV of 1877, s. 14.

MINOR—*Muhammadan Law—Mother—Guardian.* *See* Civil Procedure Code, s. 13.

———*Custody of children.* *See* Muhammadan Law 3.

MISJOINDER, DISMISSAL OF SUIT FOR. *See* Civil Procedure Code, s. 13.

MISSING PERSON—*Act I of* 1872, *ss.* 107, 108. *See* Hindu Law 10.

MORTGAGE—*Redemption—Suit to redeem brought before expiration of term of mortgage*] A mortgage-deed, dated the 15th March, 1883, stipulated that the mortgagor would "pay the interest every year, and the principal in ten years;" that "the principal shall be paid at the promised time and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 15th July, 1884.

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Held, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju* v. *Vadju* referred to.

Raghubar Dayal *v.* Budhu Lal 95

2. MORTGAGE—*Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of* 1882, *ss.* 95, 100—*Limitation—Act XV of* 1877, *Nos.* 134, 148—*Burden of proof.*] *K* and *J* jointly mortgaged 36 sihams or shares of an estate to *C*, giving him possession. *C* transferred his rights as mortgagee to *T* and *M*. In execution of a decree for money against *K* held by *M*, *K's* rights and interests in the mortgaged property were sold and were purchased by *P*, whose heirs paid the entire mortgage-debt. *B*, an heir of *J*, sued the heirs of *P*, to recover from them possession of *J's* sihams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P* The plaintiff alleged that the mortgage to *C* had been made forty years before suit The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since *C* transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sihams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage and neither adduced any proof on the point.

Held, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

Held, therefore, that No. 148, and not No. 134, of sch. ii of the Limitation Act was applicable to the suit.

Unrunnissa v *Muhammad Yar Khan* distinguished. *Pancham Singh* v *Ali Ahmad* referred to.

Held also, that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram* v. *Narandar Bahadoor Singh* referred to.

Nura Bibi *v.* Jagat Narain 295

3. ——————*Joint mortgage—Suit for redemption—Jurisdiction—Court fee—Valuation of suit—"Subject-matter in dispute"—Act VII of* 1870, *s.* 7, *art. ix—Act VI of* 1871, *s.* 20—*Statute, construction of.*] A deed of mortgage was executed by *P*, *T*, and *S* for Rs. 4,000. *A*,

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the purchaser of the share of *S*, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of *P* and *T*, the other mortgagors.

Held by the Full Bench, with reference to s 7, art ix of the Court-Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5 4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo* v *Nagvekar* referred to.

Held also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction.

Per MAHMOOD, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

Amanat Begam *v.* Bhajan Lal 438

4. MORTGAGE—*First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to first mortgage.*] In 1874 a plot of land, No. 111, which, in 1866, had been mortgaged to *L*, was with other property mortgaged to *R*. In 1878 the equity of redemption in plot No. 111 was purchased by *J*, who paid off the mortgage of 1866. *R* brought a suit against *J*, to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874.

The Full Bench modified the decree of the Court of first instance by inserting after the words "land No 111 be exempted from the hypothecation lien" the words 'in that property the interest of the plaintiff as second mortgagee only to be sold."

Per OLDFIELD, J, that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

Per STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866; in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it endured.

Raghunath Prasad *v.* Jurawan Rai 105

——— *First and second mortgages—Registered and unregistered documents—Fraudulent transfer—Act IV of* 1882, *s.* 53. *See* Act III of 1877, s. 50.

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MORTGAGE—*First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of* 1882, *ss* 78, 85. *See* Civil Procedure Code, s. 13.

5. ——— *Mortgage by conditional sale—Interest—Foreclosure.*] A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decree. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest. *Held* that, whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshar Singh* v. *Kanahia Sahu* referred to.

Allah Baksh *v.* Sada Sukh 182

6. ——— *Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of* 1806, *s.* 8—*Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of* 1882] The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of those requirements to assert an absolute title to the property of the mortgagor. *Norender Narain Singh* v. *Dwarka Lall Mundur* and *Madho Pershad* v. *Gajadhar* followed.

In a suit for possession of immoveable propety by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

Held, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed

Held, also, that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law.

Sitla Bakhsh *v.* Lalta Prasad 388

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MORTGAGE—*Mortgage by conditional sale* *See* Pre emption.

7 ——————*Usufructuary mortgage—Interest—Waiver*] By a deed of usufructuary mortgage dated in 1875, a sum of Rs 30,000, with interest at Re 1 per cent per mensem was advanced on the security of certain property for a period of ten years The deed contained various provisions for securing the payment of interest to the mortgagee, and among these a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly leaving an agreed balance of interest to be paid yearly in cash There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re 1 6 per cent per mensem The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid In November, 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage money, claiming interest from the date of the mortgage-deed to the date of the suit at Re 1-6 per cent per mensem

Held that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, *i e*, Re 1 per cent per mensem

Ganga Sahai *v* Lachman Singh 194

8. ——————*Usufructuary mortgage—Redemption—Regulation XXXIV of* 1803, *ss* 9, 10—*Act XXVIII of* 1855—*Act XIV of* 1870—*Act IV of* 1882, *s* 2] A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession contained the following conditions —"Until the mortgage money is paid the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee and shall not be deducted at the time of redemption. At the end of any year the mortgagors may pay the mortgage-money and redeem the property Until they pay the mortgage-money neither they nor their heirs shall have any right in the property" In 1884, a representative in the title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits and that he was entitled to a balance of Rs 47 It was found that from the profits after deducting Government revenue, the principal money with interest at the rate of 12 per cent per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s 62 (*b*) of the Transfer of Property Act (IV of 1822), and with reference to the terms of the deed of mortgage the plaintiff was not entitled to recover the property until he paid the mortgage money

Held that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

Held that the provisions of ss 9 and 10 of Regulation XXXIV of 1803 which was in force when the deed of mortgage was executed, were not effected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882, that these provisions were incidents attached to the mortgagor's rights, of which he was entitled to have the benefit, and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage money with 12 per cent interest had been realized by the mortgagee from the profits of the property.

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9. MORTGAGE—*Usufructuary mortgage—Pre-emption—Redemption—Interest—Act IV of* 1882, *ss.* 51, 83, 84.] Although a successful pre-emptor becomes substituted for the original transferee and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre emption as would entitle him to any benefits arising out of the property which he is entitled to take, but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

Uodan Singh v. *Muneri Khan* dissented from. *Manik Chand* v. *Rameshur Rae*, *Baldeo Pershad* v. *Mohun*, and *Ajudhia* v. *Baldeo Singh* followed.

In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884.

Held that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882, he had no interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

Semble that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali* v. *Mathura Kandu* referred to.

Held, with reference to s. 84 of the Transfer of Property Act (IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage.

Held, with reference to the last paragraph of s. 51 of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut.

Deo Dat *v.* Ram Autar 502

———————*Words creating simple mortgage. See* Bond 2.

———————. *See* Adverse possession. *See*-land.

MUHAMMADAN LAW—*Suit for restitution of conjugal rights—Dower—Plea of non-payment—Form of decree.*] According to the Muhammadan Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under

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the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband's without her consent, but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principle recognised by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim.

It is a general rule of interpretation of the Muhammadan law that in cases of difference of opinion amongst the jurisconsults, Imam Abu Hanifa and his two disciples Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight.

Moonshee Busloor Ruheem v. *Shumsoonissa Begum*, *Mullecha* v. *Jumeela*, *Ranee Khajooroonissa* v *Ranee Ryeesoonissa*, *Nawab Bahadoor Jung Khan* v *Uzeez Begum*, *Jaun Bebee* v *Sheikh Moonshee Beparee*, *Gatha Ram Mistree* v. *Moohita Kochin Atteah Doomoonee*, and *Eidan* v. *Mazhar Husain* referred to. *Sheikh Abdool Shukhoor* v. *Raheemoonnissa*, *Wilayat Husain* v. *Allah Rakhi*, *Nasrat Husain* v. *Hamidan*, and *Nasir Khan* v. *Umrao* dissented from.

In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower debt in Court It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that, inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan law.

Held, by the Full Bench, that the lower appellate Court's view of the Muhammadan law relating to conjugal rights and the husband's obligation to pay dower was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit.

Abdul Kadir *v.* Salima 149

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2. MUHAMMADAN LAW—*Legitimacy—Effect of acknowledgment of sonship.*] *Held* by PETHERAM, C. J., that, according to the Muhammadan law, the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashrufood-Dowlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*, *Muhammad Azmat Ali Khan* v. *Lalli Begum*, and *Sadakut Hossein* v. *Mahomed Yusuf* referred to.

In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son.

Held by PETHERAM, C. J. (BRODHURST, J., dissenting), that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the *status* of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the *status* of legitimacy.

Held by BRODHURST, J., *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff and give him the *status* of a son capable of inheriting. *Sadakut Hossein* v. *Mahomed Yusuf* referred to.

Muhammad Allahdad Khan *v.* Muhammad Ismail Khan ... 234

3. ——————— *Custody of children—Act IX of* 1861, *s.* 5—*Appeal.*] The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1881, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

Held that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

Held, also, that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case

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of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations, that might arise, warranting the Court in refusing an application for the custody of minors), there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

Idu *v.* Amiran 322

MUHAMMADAN LAW—*Alienation by widow—Rights of other heirs—Minor—Mother—Guardian. See* Civil Procedure Code, s 13

——— ——— ——— *Wajib-ul arz. See* Family custom, Fraudulent transfer. Pre-emption 2, Will

MUNICIPAL RULES—*Infringement of rules—Prosecutions. See* Act XV of 1883. s. 69

MURDER—*Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of* 1860, *ss* 300, *Exception* 1, 302, 304.] Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

Held that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation" within the meaning of s. 300, *Exception* 1, of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder.

Queen-Empress v. *Damarua* distinguished by STRAIGHT, Offg. C. J.

Queen-Empress *v.* Mohan 622

——— ——— *Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of* 1860, *ss.* 300, *Exception* 1, 302, 304] An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour and killed her with the chopper.

Held that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress* v. *Damarua* and *Queen-Empress* v. *Mohan* referred to.

Queen-Empress *v.* Lochan 635

N.-W. P. GOVERNMENT NOTIFICATION No. 865, DATED THE 3RD NOVEMBER, 1869—*Rule VI., legality of. See* Act XV of 1883 s. 69.

PARDAH-NASHIN—*Civil Procedure Code, ss.* 129, 136—*Discovery of documents*] In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was

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that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying that the Court would have it verified in any manner thought proper, provided that their *pardah nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiffs and no sufficient ground for non-compliance had been shown.

Held, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs with regard to the orders made under s 129 of the Code, that, looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s 136

Kalian Bibi *v.* Safdar Husain Khan 265

2 PARDAH-NASHIN—*Execution of deeds.*] A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorized by a power-of attorney in that behalf. The only proof given by the plaintiff that this power-of-attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them nor did he know their voices, that he went to their residence, that there were two women behind a *pardah*, whom the executants of the bond said were their respective wives, and that these women acknowledged they had made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond.

Held that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it.

Buzloor Raheem v *Shumsoonnissa Begum*, *Ashgar Ali* v *Debroos Banoo Begum*, and *Sudisht Lal* v. *Sheobarat Koer* referred to by MAHMOOD, J.

Behari Lal *v.* Habiba Bibi 267

PARTNERSHIP—*Arbitration.* *See* Civil Procedure Code, ss. 525, 526.

——— ———. *See* Joint Hindu family.

PENALTY. *See* Bond 1.

PLAINT, REJECTION OF. *See* Civil Procedure Code, s 44, Rule *a*.

PLEADINGS. *See* Act I of 1877, s. 21.

PLACTICE—*Civil Procedure Code, s.* 549—*Appeal—Poverty of appellant—Security for costs*] *Held* by the Full Bench (TYRRELL, J, *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

Jiwan Ali Beg *v.* Basa Mal 203

PRE-EMPTION—*Mortgage by conditional sale—Act XV of* 1877, *sch ii, No.* 120—*Time from which period of limitation begins to run*] A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December, 1875. He then sued to have the conditional sale declared

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absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April, 1881.

In a suit for pre-emption in respect of the mortgage—*held*, with reference to art 120, sch. ii of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April, 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal* v. *Gajraj Singh* and *Prag Chaubey* v. *Bhajan Chaudhri* referred to.

Udit Singh *v.* Padarath Singh 54

PRE-EMPTION—*Muhammadan Law—Acquiescence in sale—Relinquishment of right.*] According to the Muhammadan law, if a pre-emptor enters into a compromise with the vendee or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadan law, it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves.

Held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption and were precluded from enforcing it.

Habib-un-nissa *v.* Barkat-Ali 275

3. ——*Sale to a co-sharer and stranger—Specification of interest sold to stranger and price—Right of pre-emption of vendee-co-sharer*] The principle of denying the right of pre-emption, except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers

The *ratio decidendi* of *Bhawani Prasad* v *Damru* explained. *Sheodyal Ram* v. *Bhyro Ram* distinguished. *Guneshee Lal* v. *Zaraut Ali* and *Manna Singh* v. *Ramadhin Singh* dissented from.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers-vendees had a pre-emptive right of the same degree as the plaintiffs, nevertheless they, having joined a stranger with them in purchasing the property, had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale deed.

Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

Sheobharos Rai *v.* Jiach Rai 162

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4. PRE-EMPTION—*Wajib-ul-arz—Right of pre-emptor to stand in the position of the purchaser.*] A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held that it could not be said that the partners of the vendor had not only the right of pre-emption, but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and purchaser.

Nihal Singh *v.* Kokalo Singh 29

5. ——— ——— *Wajib ul arz—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in wajib-ul-arz—Purchaser entitled to recover purchase-money.*] The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger for a price higher than that which would be payable according to the above-mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers.

Held by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to any one else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor.

Akbar Singh v. *Juala Singh* distinguished by Tyrrell, J.

Karim Bakhsh Khan *v.* Phula Bibi 102

——— ——— *Usufructuary mortgage—Redemption—Interest.* *See* Mortgage 9.

——— ——— *See* Adverse possession. *Wajib ul-arz.*

PRIVATE DEFENCE, RIGHT OF. *See* Act XLV of 1860, s. 353.

PRIVY COUNCIL DECREE—*Execution for costs—Rate of exchange—Civil Procedure Code, s.* 610—*Meaning of "for the time being."* *See* Civil Procedure Code, s. 610.

PROSECUTION, WITHDRAWAL FROM—*Government Pleader—Public Prosecutor—Criminal Procedure Code, s.* 494.] *Held* by the Full Bench that a person appointed by the Magistrate of the District, under s 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

Queen-Empress *v.* Madho 291

PUBLIC NUISANCE. *See* Act XLV of 1860, s. 291.

PUBLIC PROSECUTOR. *See* Prosecution, withdrawal from.

PUBLIC SERVANT. *See* Act XLV of 1860, s. 21.

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PUBLIC SERVANT FRAMING INCORRECT RECORD. *See* Act XLV of 1860, ss. 24, 25.
PURCHASER FOR VALUE WITHOUT NOTICE. *See* Adverse possession.
QUESTION FOR COURT EXECUTING DECREE. *See* Civil Procedure Code, s. 244.
REGISTERED AND UNREGISTERED DOCUMENTS. *See* Act III of 1877, s. 50.
RENT—*Services.* *See* Rent-free grant.
——— *See* Ex-proprietary tenant 1.
REGULATION XXXIV OF 1803, ss. 9, 10. *See* Mortgage 8.
———XVII OF 1806, s 8. *See* Mortgage 6.
———VII OF 1822, s 9, cl i. *See Wajib-ul arz.*
"RENT FREE GRANT"—"*Rent*"—*Services—Jurisdiction—Civil and Revenue Courts—Act XII of* 1881, *ss.* 3 (2), 30, 95 (*c*)—*Act XIX of* 1873, *ss.* 3 (4) 79-89, 241 (*h*).] A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s 30 of the N.-W. P. Rent Act (XII of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court.

Per OLDFIELD, J.—The definition of the term "rent" in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land Further, there was no such grant as is contemplated by s. 30 of the Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX of 1793 and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act. *Mutty Lall Sen Gywal* v. *Deshkar Roy* and *Puran Mal* v. *Padma* referred to.

Held by OLDFIELD, J, (MAHMOOD, J., dissenting) that the suit could not be held to be one to resume a rent-free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

Held by MAHMOOD, J., that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that, under these circumstances, the suit was not cognizable by the Civil Court

Per MAHMOOD, J.—The services connected with the grant in this case did not constitute "rent" within the meaning either of the N.-W. P. Rent Act or of the N.-W. P. Land Revenue Act (XIX of 1873), and the word "render" in s 3 of the former Act does not include or imply the rendering of services or labour. The word "rent" is probably used as the equivalent of the Hindustani words *lagan* or *poth*, representing the compensation receivable by the landlord for letting the land to a cultivator, and s. 3 of the Rent Act, where it uses the expressions "paid, delivered, or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisement or valuation of the produce. The grant in the present case was a rent-free grant of the nature of *chakran* or *chakri*, *i. e.*, service-tenure, to which s. 41 of the Regulation VIII of 1793 related. The incidents of the tenure would be governed by s 30

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of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 10 of Regulation XIX. of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (*c*) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241 (*h*) of the latter Act. *Puran Mal* v. *Padma, Tika Ram* v. *Khuda Yar Khan*, and *Forbes* v. *Meer Mahomed Tuquee* referred to.

Waris Ali *v.* Muhammad Ismail 555

RES-JUDICATA—*Civil Procedure Code, ss.* 562, 588 (28)—*Second appeal—Civil Procedure Code, ss.* 565, 566—*Determination of case by High Court.*] In a suit for pre-emption, based on the *wajib-ul-arz* of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower appellate Court, dissenting from this opinion, reversed the first Court's decree and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, *viz.*, the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January, 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiff had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566 as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s. 566 as to the amount of consideration, and, accepting the first Court's finding upon that issue, decreed the plaintiff's claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the partes. All the evidence necessary to the determination of the case was on the record.

Held, by the Full Bench, that the defendants were not prevented by the operation of the High Court's order of the 3rd January, 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions of fact involved therein were decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit.

Per STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order dealing with the plaintiffs' right of pre-emption could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right.

Held per PETHERAM, C. J., and OLDFIELD and TYRRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that, in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen* v. *Jasoda Kuar* referred to.

Per STRAIGHT and BRODHURST, JJ., *contra*.

Bal Kishen v. *Jasoda Kuar* referred to.

Deokishen *v.* Bansi 172

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RES-JUDICATA—*Dismissal of suit under s.* 10, *cl.* ii, *Act VII of* 1870—*Dismissal of suit for misjoinder—Dismissal of suit "in its present form" See* Civil Procedure Code, s. 13.

——————*Civil Procedure Code, s.* 13—*Meaning of "between parties under whom they or any of them claim." See* Civil Procedure Code, s. 13.

——————*Hindu widow—Decree against widow—Reversioner. See* Hindu Law 9.

——————*Set-off. See* Set-off.

——————. *See* Civil Procedure Code, s. 13.

RESTITUTION OF CONJUGAL RIGHTS—*Husband and wife—Hindu law—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.*] In a suit by a Hindu, a *sunar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual excommunication, and upon making certain amends, he could obtain restoration to his caste.

Held that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or the other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

Held, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognising the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

Held also that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights.

Paigi *v.* Sheonarain 78

REVERSIONER—*Hindu Law—Daughter's son—Hindu widow—Decree against widow - Res judicata. See* Hindu law 9.

——————*Hindu widow—Decree against widow. See* Hindu widow 1.

——————*Hindu Law - Partition between widow and mother, both claiming life interest—Alienation by mother—Declaratory decree. See* Hindu Law 11.

SADHS. *See* Hindu Law 11.

SECURITY FOR COSTS. *See* Practice.

SEPARATE SUIT. *See* Civil Procedure Code, s. 244.

SERVICES—*Rent See* Rent-free grant.

SESSIONS COURT—*Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code, ss* 28, 226, 236, 237, 537.] Subject to the other provisions of the Criminal Procedure Code, s 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

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Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of *J*, and the third with abetment of the offence. At the trial the Sessions Judge added a charge against all the accused of causing hurt to *C*, and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*.

Held that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

Held also that the Sessions Judge had power, under s. 28 of the Code, to try the charge, assuming that he had power to add it.

Queen-Empress *v.* Kharga 665

SESSIONS COURT—*Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code. s.* 216—*Witness summoned by Sessions Court—Power of Sessions Judge to summon witness. See* Criminal Procedure Code, s. 216.

SET-OFF—*Res-judicata—Civil Procedure Code, ss.* 13, 111—*Court-fee on set off.*] In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which, he alleged, the plaintiff had sold on his account on commission It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

Held that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set off the amount claimed as due for goods sold on commission against the plaintiff's demand, and that the claim for such set-off was not barred under the provisions of s 13.

Held also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

Amir Zama *v.* Nathu Mal 396

SIR-LAND—*Ex-proprietary tenancy—Act XII of* 1881, *s.* 7.] The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.-W P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled as *sir*, and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir*-land in a village to the plaintiff, who at that time was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that, after the sale, he continued in possession of the *sir*-land till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

Held that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N.-W. P. Rent Act;

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and the plaintiff's contention that because for four or five years the defendants failed to assert their ex proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

Held also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s 7 of the Rent Act.

Harjas *v.* Radha Kishan 256

2 SIR-LAND—*Act I V of* 1882, *ss* 41, 48—*Transfer by ostensible owner—Act XII of* 1881, *s* 7—*Meaning of "held"—Statute, construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of* 1873—*Sale of mortgagor's rights while that Act was in force—Right of mortgagee*] In 1869 *A* and *J* two co-sharers of a moiety of a ten biswas share in a village (*F* and *W* being also co-sharers in the same moiety), joined with *H* the holder of the other moiety, in giving to *K* a usufructuary mortgage of 87 bighas of land, being the whole of the *sir* land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money and to receive profits in lieu of interest, and he obtained possession accordingly In 1872, *F W*, and *A* gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of *sir*-land, and it was stated in the deed that half the mortgage money due to *K* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem In November, 1876, *H's* five biswas share, together with its *sir* land was sold in execution of a decree Subsequently *K* alleging that the mortgagees under the deed of 1872 and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land by virtue of his mortgage-deed of 1869 The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F's* and *W's* share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November, 1876, *H* became an ex proprietary tenant of his *sir*-land, and that to give the plaintiff possession thereof would be contrary to the provision of s 7 of Act XVIII of 1873 (N-W P. Rent Act).

Held that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed *F* and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir*-land, and inasmuch as the statements contained in the mortgage deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s 41 of the Transfer of Property Act applied to the case, and *F* and W had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo* v. *McQueen* referred to

Per MAHMOOD, J., with reference to the effect of the execution-sale of November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case, that, by reason of the sale, *H* who had proprietary rights in the mahal, and held the five biswas share of the *sir* as such (the word "*held*" as used in s 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the

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land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage, subject only to *H's* rights as an ex-proprietary tenant; that the rights of the purchaser of *H's* share under the sale were subject to the mortgage of 1869; and that by virtue of the rule enunciated in s. 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi* v. *Radha Kishan* referred to.

Per TYRRELL, J, that in 1876, by reason of the execution-sale, the *sir* rights and interests of *H* mortgaged by him in 1869, as such, went out of existence and assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law a right to physical possession of the actual land; and that, subject to this new right of *H's*, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by *H's* vendees.

Karamat Khan *v* Sami ud-din 409

STATUTE, CONSTRUCTION OF—*Retrospective effect. See* Sir land 1.
——— ——— ——— ———*General words—Retrospective effect. See* Civil Procedure Code, s 230.
——— ——— ——— ———*Court-Fees Act. See* Mortgage 3.
——— ——— ——— ———*Jurisdiction See* Mortgage 3.
——— ——— ——— ———*See Ex-parte* decree 2.
STRIDHAN—*Succession. See* Hindu law 8.
SUIT, HEARING OF—*Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor. See* Civil Procedure Code, s. 191.
———, WITHDRAWAL OF—*Appellate Court, powers of—"Decree"—Appeal—Civil Procedure, ss.* 373, 582] Where, on appeal from a decree dismissing a suit, the appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under s. 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one—*held* that the order of the appellate Court was a "decree" within the meaning of the Civil Procedure Code, and afforded a proper ground of second appeal to the High Court.

Per STRAIGHT, J, that with reference to the terms of s. 582 of the Civil Procedure, Code, the appellate Court had power to avail itself of the provisions of s. 373, and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory* v. *Doolee Chand Kandary Mull* and *Khatoon Koonwar* v. *Hurdoot Narain Singh* referred to.

Also *per* STRAIGHT, J., that it could not be said that the appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal.

Per TYRRELL, J., that it might be taken that the appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal

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objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code.

Ganga Ram v. Data Ram 82

SUIT BY CO-SHARER FOR PROFITS. *See* Lambardar and co-sharer.

——— LESSEE OF OCCUPANCY-TENANT FOR RECOVERY OF POSSESSION. *See* Jurisdiction 1.

——— MORTGAGEE FOR POSSESSION OF THE MORTGAGED PROPERTY. *See* Adverse possession.

——— FOR DECLARATION THAT PROPERTY IS WAKF—*Act XX of 1863, ss* 14, 16, 18—*Civil Procedure Code, s.* 539—*Act I of* 1877, *s.* 42.] A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf* He did not allege himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement, in which he denied that the property now in question was *wakf*.

Held that, unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained.

Held that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863, or under s 539 of the Civil Procedure Code.

Held that the suit was not maintainable under the provisions of s. 42 of Act 1 of 1877 (Specific Relief Act).

Held, therefore, that the suit was not maintainable.

Held, further, that the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable.

Wajid Ali Shah v. Dianat-ullah Beg 31

——— MONEY HAD AND RECEIVED FOR PLAINTIFF'S USE. *See* Act XV of 1877, sch. ii, No. 97.

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See Vendor and purchaser 1.

——— PAID UPON AN EXISTING CONSIDERATION WHICH AFTERWARDS FAILS. *See* Act XV of 1877, sch. ii, No. 97.

——— PARTITION BY PERSON MAKING FALSE CLAIM TO PROPERTY. *See* Hindu Law 1.

——— POSSESSION OF IMMOVEABLE PROPERTY. *See* Act XV of 1877, sch. ii, No. 118.

——— REDEMPTION OF MORTGAGE—*Valuation of suit—Jurisdiction—Court-fee.* *See* Mortgage 3.

———*Limitation—Burden of proof.* *See* Mortgage 2.

——— REMOVAL OF TREES—*Landholder and tenant—Jurisdiction—Act XV of* 1877, *sch.* ii, *No.* 32. *See* Jurisdiction 2.

——— RESTITUTION OF CONJUGAL RIGHTS. *See* Muhammadan Law 1. Restitution of Conjugal rights.

——— SALE OF MORTGAGED PROPERTY. *See* Jurisdiction 3.

——— TO OBTAIN A DECLARATION THAT AN ALLEGED ADOPTION IS INVALID OR NEVER TOOK PLACE. *See* Act XV of 1877, sch. ii, No. 118.

SURETY—*Act IX of* 1872 (*Contract Act*), *ss.* 134, 137, 139, *and* 141.] A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms :—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month ; and for the satisfaction of the

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decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

Held that the terms of the bond requiring the creditor to execute his decree within one month were peremptory and imported much more than the usual agreement, under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favour of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s 141); and that the suit must consequently be dismissed.

Hazari v. Chunni Lal 259

SURETY—*Execution of decree—Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss.* 253, 545, 546. *See* Execution of decree 5.

TREES. *See* Ex-proprietary tenant 2.

VENDOR AND PURCHASER—*Failure of consideration—Suit for money had and received for the plaintiff's use—Debt—Limitation.* Prior to September, 1879, pecuniary dealings took place between *D* and *B*, resulting in a debt due by the former to the latter of Rs. 33,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and on the 1st September, 1879, it was arranged that *D* should execute a sale-deed conveying to *B* certain immoveable property for Rs 55,000, and that *B* should pay this amount by giving *D* credit to the extent of the debt and paying the balance in cash. In August, 1880, *D* sued *B* for specific performance of the contract, which, he alleged, had been settled and executed for the sale of the property. *B*, in defence, alleged that although certain terms and conditions as to the sale had been definitely settled for embodiment in a formal sale-deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by *D* on the 1st September, 1879, he had never accepted that document In March, 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the contract alleged by *D*, and that the document of the 1st September, 1879 had never been finally accepted, so as to be binding and enforceable by law. In September, 1884, *B* sued *D* for recovery of the sum of Rs. 33,000, with interest. He contended that, under the terms of the arrangement made on the 1st September, 1879, the debt of Rs. 33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but, having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March, 1884, dismissing the suit for specific performance.

Held that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by the terms of the agreement itself which the plaintiff set up no deposit was payable, and the price was not to be paid till the

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completion of the contract, and inasmuch as the plaintiff, in demanding payment after the negotiations had failed, demanded it simply as for the balance of the old debt, and not as for the return of a deposit.

Held, further, that the 1st September, 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 8th September, 1884, it was barred by limitation.

Dhum Singh *v.* Ganga Ram 214

2. VENDOR AND PURCHASER—*Act IV of* 1882, *ss* 10, 11—*Contemporaneous "ikrar-namah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co-sharer—Collection of rents by co-sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages*] *M*, a co-sharer in a village, transferred to *A*, another co-sharer, a two annas share by deed of sale. Upon the same date *A* executed an *ikrar-namah*, in which he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. A suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrar-namah*, *A* had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by *A*, on the basis of which the suits were dismissed, and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages, from *A* the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrar-namah*, to avoid the sale deed which preceded it.

Held that the deed of sale and the *ikrar-namah* must be regarded as recording one single transaction, *i.e.*, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which on the face of it professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Parshad* v. *Lachmi Parshad* referred to.

Held that provisions of this kind, which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognise or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fall.

Kolman v. *Johnson*, *Anantha Tirtha Chariar* v. *Naymuthu Ambalagaren*, *Bradley* v. *Peixoto*, and *Hussain Khan Bahadur* v. *Nateri Srinivasa Chartu* referred to. *Balaji J. Rahalkar* v. *Narayanbhat* distinguished.

Held by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized

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sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

Held by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal with the question of costs and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali* v. *Thangakhi Ammal*, *Jalam Punja* v. *Khoda Javra*, *Kabir* v. *Mahadu*, and *Pranshankar Shivshankar* v. *Govindhlal Parbhudas* referred to.

Mahram Das *v.* Ajudhia 452

3. VENDOR AND PURCHASER—*Non-payment of consideration-money—Burden of proof.*] In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

Held that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

Held, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.

Achobandli Kuari *v.* Mahabir Prasad 41

——— ———*See* Pre-emption 5.

WAIVER. *See* Mortgage 7.

WAJIB-UL-ARZ - *Pre-emption—Evidence of contract and custom—Act XIX of* 1873, *s.* 91—*Regulation VII of* 1822, *s.* 9, *cl.* (i).] The *wajib-ul-arz* of a village is a document of a public character, prepared with all publicity, and must be considered as *primâ facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of the document and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul-arz* was not binding on the vendor-defendant, as that document did not bear his signature, and the lower appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

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Held that the lower appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul arz* was made before Act XIX of 1873 came into force, yet the weight which would attach to it entries, both as proof of the contract as well of custom, was very strong. *Isri Singh* v. *Ganga* referred to.

Muhammad Hasan *v.* Munna Lal 434

WAJIB UL-ARZ. *See* Family custom. Pre-emption 4, 5.

WILL—*Muhammadan law—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation*] Words such as "always" and "for ever," used in an instrument disposing of property do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will, made by a Muhammadan, gave shares in his property to his surviving widow, son, and grandchildren, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates ..... All the matters of management in connection with this estate should necessarily and obligatorily rest 'always' and 'for ever' in his hands." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will—*held* that, on its true construction, the plaintiff, a sharer under it, was entitled to the full proprietary right in, and to the possession of, her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.

Muhammad Abdul Majid *v.* Fatima Bibi 39

WITNESS, THREATENING—*Duty of Magistrate. See* Criminal Procedure Code, s. 512

——FOR DEFENCE—*Refusal by Magistrate to summon—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness. See* Criminal Procedure Code, s. 216.